Staff Director
William Monroe Trotter Collaborative for Social Justice, Harvard Kennedy School
79 John F. Kennedy St
Cambridge, MA 02138
(205) 515-2088
devoncrawford@hks.harvard.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

ADNAN PERWEZ
814 University Ave Berkeley, CA 94710
(408) 966-5260 | aperwez@berkeley.edu

June 22, 2023

The Honorable P. Casey Pitts
United States District Court, Northern District of California
San Jose Courthouse
280 South 1st Street
San Jose, CA 95113

Dear Judge Pitts,

I am a rising third-year student at the University of California, Berkeley, School of Law. I write to apply for a clerkship in your chambers, for either the 2023 or 2024 term.

As an aspiring civil rights attorney dedicated to sharpening my research and litigation skills, I believe I would make a strong addition to your chambers. I worked as a researcher during my previous graduate degree, having my work cited and adopted by the City of Birmingham among others. During my externship with Chief Judge Miranda M. Du, I drafted dozens of court orders, as well as extensive bench memorandums on complex, novel legal questions. And as a student in the Ninth Circuit Practicum, I am briefing a case that I will later be arguing in the federal Court of Appeals. These experiences have trained me to think and write more clearly about nuanced legal questions, as well as understand the importance of a kind, collaborative spirit in chambers.

As a first-generation Muslim American who grew up in a heavily surveilled community, I will be doing work in civil rights impact litigation for the rest of my career. Through this clerkship, I hope to deepen my legal research skills and gain invaluable mentorship to bring to bear to my work.

My resume, transcript, and writing sample are submitted with this application. Berkeley will submit my recommendations, as listed below:

Catherine Fisk, *Barbara Nachtrieb Armstrong Professor of Law*
cfisk @law.berkeley.edu | (510) 642-2098

Christopher Kutz, *C. William Maxeiner Distinguished Professor of Law*
ckutz@law.berkeley.edu | (510) 642-6053

Delaney Green, *Clinical Teaching Fellow at the Policy Advocacy Clinic*
delaney_green@berkeley.edu | (503) 753-2509

Please let me know if I can provide anything else. I can be reached anytime by phone at (408) 966-5260 or email at aperwez@berkeley.edu. Thank you very much for considering my application.

Respectfully,

ADNAN PERWEZ

814 University Ave, Berkeley CA 94710 | (408) 966-5260 | aperwez@berkeley.edu

EDUCATION

UNIVERSITY OF CALIFORNIA, BERKELEY, SCHOOL OF LAW
J.D. Candidate, May 2024
Honors: Dean's Fellowship
Activities: Ninth Circuit Practicum
California Law Review Vol. 112, Articles & Essays Editor
Research Assistant to Professor john a. powell
Berkeley Law Alternative Service Trip, Mississippi

HARVARD DIVINITY SCHOOL
M.T.S. (Master of Theological Studies) in Islamic Law & Political Thought, May 2021

UNIVERSITY OF CALIFORNIA, DAVIS
B.A., *cum laude*, in Political Science, *cum laude* in History; *magna cum laude* in Religious Studies, June 2019
Honors: Outstanding Senior Award; Departmental Citations for Excellence in Political Science, History, Religious Studies
Thesis: "Between Hierarchy & Reform: Conceptualizing the Political Agency of the Common People in Islamic Thought"

EXPERIENCE

ACLU-NATIONAL, SPEECH, PRIVACY, & TECHNOLOGY DEPT (ACLU-SPT), New York City, NY May 2023 – present

POLICY ADVOCACY CLINIC, Berkeley, CA Aug. 2022 – present
Preparing policy strategy, research briefs, and draft legislation bill for client, the Southern Poverty Law Center, in campaign to abolish juvenile fees and fines in Mississippi. Spearheading judicial advocacy strategy: conducting extensive research of judges in key counties, overseeing outreach to, and brainstorming tactics on to how to build support before legislation session begins.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA, Reno, NV May 2022 – July 2022
Judicial Extern to the Honorable Chief Judge Miranda M. Du
Drafted multiple court orders, including for motions to remand, motions for partial summary judgment, and motions to dismiss. Researched and drafted memos on complex novel legal issues, such as analyzing whether compensatory damages could be available for 2nd Amendment §1983 claims post-*New York State Rifle & Pistol* in a police brutality case, interpreting proper statute of limitations post-*Sharkey*, and analyzing contours of *Monell* liability in a §1983 case against the City for improper police training.

RESEARCH ASSISTANT TO PROFESSOR CORNELL WILLIAMS BROOKS, Cambridge, MA June 2021 – May 2022
Prepared extensive analytical briefs, including a research memo on Confederate statues used in the Munk Debates, budgetary analysis that was presented to the L.A. Sheriff Department, racial equity funding sources for HBCUs, led preparation for a pitch meeting with CNN on TV show for Black historical figures, and an op-ed on police brutality published in the *USA Today*.

BLOOMBERG HARVARD CITY LEADERSHIP INITIATIVE, Cambridge, MA Jan. 2021 – June 2021
Lead Research Fellow
Drafted Public Safety Reform guide rethinking police reform through the lens of public safety and self-evaluating holistic framework. Presented and distributed guide to over 200+ mayors during the Special Session for Harvard Bloomberg Mayors.

MONROE TROTTER COLLABORATIVE AT THE HARVARD KENNEDY SCHOOL, Cambridge, MA Aug. 2020 – Jan. 2021
Social Justice Fellow
Led strategy on regional Southern collaboration for police reform, and conducted policy research on empowerment models. Worked with Mayor's Office to launch "Reform and Reimagine" report, now official document for citywide police reform.

SERVICE & OTHER

NATIONAL STUDENT DIRECTOR, Muslim Student Association National Dec. 2019 – Present
PRESIDENT & BOARD OF TRUSTEES MEMBER, Muslim Student Association West June 2018 – June 2019
LANGUAGES: Hindi – native fluency; Urdu – native fluency; Classical Arabic – intermediate proficiency

Berkeley Law
University of California
Office of the Registrar

Adnan Perwez
Student ID: 3036500313
Admit Term: 2021 Fall

Academic Program History
Major: Law (JD)

2021 Fall

Course		Description	Units	Law Units	Grade
LAW	200F	Civil Procedure Catherine Fisk	5.0	5.0	H
LAW	202.1A	Legal Research and Writing Ann Reding	3.0	3.0	CR
LAW	202F	Contracts Reza Dibadj	4.0	4.0	P
LAW	230	Criminal Law Saira Mohamed	4.0	4.0	P

	Units	Law Units
Term Totals	16.0	16.0
Cumulative Totals	16.0	16.0

2022 Spring

Course		Description	Units	Law Units	Grade
LAW	201	Torts Kenneth Bamberger	4.0	4.0	P
LAW	202.1B	Written and Oral Advocacy **Units Count Toward Experiential Requirement** Ann Reding	2.0	2.0	P
LAW	220.6	Constitutional Law **Fulfills Constitutional Law Requirement** Erwin Chemerinsky	4.0	4.0	P
LAW	226.11	Topics National Security Law Theresa Bridgeman	1.0	1.0	CR
LAW	227.21	Employment Law Catherine Fisk	3.0	3.0	H

	Units	Law Units
Term Totals	14.0	14.0
Cumulative Totals	30.0	30.0

2022 Fall

Course		Description	Units	Law Units	Grade
LAW	215.42	Found,Legal Philos Christopher Kutz	3.0	3.0	HH
LAW	222	Federal Courts Amanda Tyler	5.0	5.0	P
LAW	290A	Policy Advocacy Clinic Seminar Stephanie Campos-Bui Jeffrey Selbin Devan Shea	2.0	2.0	CR
LAW	295.5P	Policy Advocacy Clinic **Units Count Toward Experiential Requirement** Stephanie Campos-Bui Yasmine Tager Anavictoria Avila Jeffrey Selbin August Patel-Tupper Devan Shea Rachel Wallace Maiya Zwerling Delaney Green Cameron Clark	4.0	4.0	CR

	Units	Law Units
Term Totals	14.0	14.0
Cumulative Totals	44.0	44.0

Carol Rachwald, Registrar

This transcript processed and delivered by Parchment

Berkeley Law
University of California
Office of the Registrar

Adnan Perwez
Student ID: 3036500313
Admit Term: 2021 Fall

2023 Spring

Course		Description	Units	Law Units	Grade
LAW	231	Crim Procedure-Investigations Orin Kerr	4.0	4.0	P
LAW	244.63	Impct Ltgtn Strat Struc & Proc **Fulfills 1 of 2 Writing Requirements** Burt Neuborne Stephen Berzon	2.0	2.0	P
LAW	287.7	Civil Rights&Anti-Discrim Law Kathryn Abrams	4.0	4.0	P
LAW	295.5X	Adv Policy Advocacy Clinic **Units Count Toward Experiential Requirement** Stephanie Campos-Bui Anavictoria Avila Jeffrey Selbin August Patel-Tupper Devan Shea Rachel Wallace Maiya Zwerling Delaney Green Cameron Clark	4.0	4.0	CR

	Units	Law Units
Term Totals	14.0	14.0
Cumulative Totals	58.0	58.0

2023 Fall

Course		Description	Units	Law Units	Grade
LAW	210	Legal Profession **Fulfills Professional Responsibility Requirement** John Steele	2.0	2.0	
LAW	241	Evidence Andrea Roth	4.0	4.0	
LAW	243.7	9th Circuit Practicum Seminar William Fernholz Judah Lakin	2.0	2.0	
LAW	243.7A	9th Circuit Practicum **Fulfills Writing Requirement Opt 1 or Experiential** William Fernholz Amalia Wille Jamie Crook Judah Lakin	4.0	4.0	

	Units	Law Units
Term Totals	0.0	0.0
Cumulative Totals	58.0	58.0

Carol Rachwald, Registrar

This transcript processed and delivered by Parchment

University of California
Berkeley Law
270 Simon Hall
Berkeley, CA 94720-7220
510-642-2278

KEY TO GRADES

1. Grades for Academic Years 1970 to present:

HH	–	High Honors	CR	–	Credit
H	–	Honors	NP	–	Not Pass
P	–	Pass	I	–	Incomplete
PC	–	Pass Conditional or Substandard Pass (1997-98 to present)	IP	–	In Progress
NC	–	No Credit	NR	–	No Record

2. Grading Curves for J.D. and Jurisprudence and Social Policy PH.D. students:

In each first-year section, the top 40% of students are awarded honors grades as follows: 10% of the class members are awarded High Honors (HH) grades and 30% are awarded Honors (H) grades. The remaining class members are given the grades Pass (P), Pass Conditional or Substandard Pass (PC) or No Credit (NC) in any proportion. In first-year small sections, grades are given on the same basis with the exception that one more or one less honors grade may be given.

In each second- and third-year course, either (1) the top 40% to 45% of the students are awarded Honors (H) grades, of which a number equal to 10% to 15% of the class are awarded High Honors (HH) grades or (2) the top 40% of the class members, plus or minus two students, are awarded Honors (H) grades, of which a number equal to 10% of the class, plus or minus two students, are awarded High Honors (HH) grades. The remaining class members are given the grades of P, PC or NC, in any proportion. In seminars of 24 or fewer students where there is one 30 page (or more) required paper, an instructor may, if student performance warrants, award 4-7 more HH or H grades, depending on the size of the seminar, than would be permitted under the above rules.

3. Grading Curves for LL.M. and J.S.D. students for 2011-12 to present:

For classes and seminars with 11 or more LL.M. and J.S.D. students, a mandatory curve applies to the LL.M. and J.S.D. students, where the grades awarded are 20% HH and 30% H with the remaining students receiving P, PC, or NC grades. In classes and seminars with 10 or fewer LL.M. and J.S.D. students, the above curve is recommended.

Berkeley Law does not compute grade point averages (GPAs) for our transcripts.

For employers, more information on our grading system is provided at: https://www.law.berkeley.edu/careers/for-employers/grading-policy/

Transcript questions should be referred to the Registrar.

This Academic Transcript from The University of California Berkeley Law located in Berkeley, CA is being provided to you by Parchment, Inc. Under provisions of, and subject to, the Family Educational Rights and Privacy Act of 1974, Parchment, Inc is acting on behalf of University of California Berkeley Law in facilitating the delivery of academic transcripts from The University of California Berkeley Law to other colleges, universities and third parties.

This secure transcript has been delivered electronically by Parchment, Inc in a Portable Document Format (PDF) file. Please be aware that this layout may be slightly different in look than The University of California Berkeley Law's printed/mailed copy, however it will contain the identical academic information. Depending on the school and your capabilities, we also can deliver this file as an XML document or an EDI document. Any questions regarding the validity of the information you are receiving should be directed to: Office of the Registrar, University of California Berkeley Law, 270 Simon Hall, Berkeley, CA 94720-7200, Tel: (510) 642-2278.

May 1, 2023

The Honorable P. Casey Pitts
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

Dear Judge Pitts:

I recommend Mr. Adnan Perwez as a law clerk following his graduation from Berkeley Law in 2024. He is a deep and creative thinker and a fluid writer who will bring to your chambers rich experience in legal analysis and deep commitment to the rule of law.

Adnan was an excellent student in two of my classes during his first year: Civil Procedure and Employment Law. He scored just a few points from the High Honors range in both courses, and in Employment Law his answer to one of the exam questions was the best in the class. I'm not surprised about that: Adnan thrives with challenging projects that require deep analysis grounded in real-world concerns. The question required students to offer advice to a California restaurant and catering business about whether various staff could be hired as independent contractors or must be hired as employees. The overlapping California and federal law in this area is notoriously tangled; Adnan did an excellent job working through the various job categories and the different tests applicable to different state and federal statutes. His analysis displayed sensitive judgments about how the business could achieve its goals while being fair to its staff and responsive to community demands about workplace justice.

As you will note from his resume, Adnan has had a rich array of work experiences before and during law school that have enabled him to build on the research and writing skills he developed as an undergraduate, where he wrote a prize-winning senior thesis, and in his graduate studies at Harvard. He's an articles editor of the California Law Review, he has been deeply involved in the Policy Advocacy Clinic working on issues of juvenile fines and fees in Mississippi, and with the ACLU and other groups on police reform in Louisiana and Alabama. He was an extern in the chambers of Judge Du on the U.S. District Court for the District of Nevada, where he worked on a variety of motions and orders. If his transcript reveals any weakness, it's that he has been so busy on so many very demanding projects that he perhaps did not reserve enough time to cram some of the nuances of some subjects into his head in time to demonstrate mastery on the exam. But I know from his outstanding performance on two of my exams, both of which were very difficult, that he is capable of excellent legal analysis.

In short, Adnan is a deeply intellectual man who is also an activist, an organizer, and on the path to becoming a superb litigator and public interest strategist.

Finally, Adnan is a very pleasant and humane person. He has worked on many teams, both in college and graduate school and in law school. In the classroom and in my office hours, he asked probing questions that benefitted everyone's learning (not just his own), and he also listened carefully to others. I could count on him to answer difficult questions whenever I needed someone to plunge in, but I never had to worry about him dominating the conversation to impress me. As much as he is driven by his deep sense of justice and mission, he knows the importance of collegiality, of being a mentor and seeking mentorship, and of doing what he can to get the work of a team done. I am confident that he'll be an asset to any chambers and will do excellent work.

Sincerely,

Catherine L. Fisk
Barbara Nachtrieb Armstrong Professor of Law

Catherine Fisk - cfisk@berkeley.edu - 510-642-2098

May 19, 2023

The Honorable P. Casey Pitts
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

Dear Judge Pitts:

I write to offer my recommendation for Mr. Adnan Perwez, who is applying for a position in your chambers as a law clerk. My knowledge of Adnan is limited but very positive: he wrote the best paper in my seminar in "Foundations of Legal Philosophy" in Fall 2022. The skill he displayed in that paper, an examination of sovereignty and statehood in both Western and Islamic legal theory, gives me confidence in his abilities to be a superb clerk.

I should say that my assessment really is limited to Adnan's writing. He was very quiet in class (in general, I have noticed that students post-pandemic are quieter than before), and his responsibilities with the substantial clinical project he was involved in meant that he missed 3 or 4 sessions over the semester, so I had relatively little direct interaction with him, apart from an office discussion of his paper topic. He did, in those limited interactions, strike me as both pleasant and intelligent.

His paper, however, was really outstanding. It combined a perceptive account of the theories of sovereignty of Carl Schmitt and Hans Kelsen – neither an easy read! – with an account of contemporary Islamic theory, laid out by Wael Hallaq, a thinker new to me. Adnan's writing is clean and precise, and while the theoretical subject doesn't let me see how he handles doctrine, it does give me a window into his ability to wrestle several ideas into place simultaneously. And that is surely a good qualification for a good portion of the work of a clerk.

You don't need me to assess Adnan's other qualifications, but I will say that the clinical work he did seems to me unusually significant, in the scope of responsibilities he took on, and apparently executed well, while also performing well academically. He is obviously someone with profound convictions about justice, and the will to put those convictions to work. Confident as I am that he will make a fine clerk, I am even more confident that he will be a superb lawyer, and I am sure that a clerkship experience will make him all the stronger.

I'd be glad to speak directly about Adnan's qualifications. My direct phone is 510-221-7865.

Yours truly,

Christopher Kutz
C. William Maxeiner Distinguished Professor of Law

May 10, 2023

The Honorable P. Casey Pitts
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

RE: Adnan Perwez, University of California, Berkeley, School of Law Class of 2024

Dear Judge Pitts:

We write with enthusiasm to recommend Adnan Perwez for a clerkship in your chambers. Adnan was a student in the Policy Advocacy Clinic during his 2L year. The Policy Advocacy Clinic is an interdisciplinary clinic where law and public policy students collaborate on non-litigation advocacy projects. Our clinic provides law students with the opportunity to learn and practice in a challenging and fast-paced environment, working side-by-side with attorneys, policy advocates, community members, and lawmakers to make meaningful policy change. As a member of the Mississippi state team, Adnan provided research and technical support to our clients in one of the country's most difficult campaigns to end the practice of charging fees to youth in the juvenile justice system and their families.

Adnan demonstrated strong legal research skills and an ability to respond quickly to project demands. When asked to provide a brief legislative history on juvenile justice reform efforts in the state, Adnan exceeded the scope of the request to provide a comprehensive analysis of each bill from a technical and communications standpoint and developed communications and advocacy recommendations for our legislation using his research. His creative and comprehensive approach to this assignment soon became a model for other clinic campaigns, not only to the benefit of our clients, but to other students who are working to improve their research and advocacy skills.

Adnan's unique and visionary perspective was evident not only in his written work, but in his oral advocacy and qualitative research methods. During a client visit in Mississippi, Adnan took individual initiative and ownership over the project and exhibited poise and professionalism under pressure. In stakeholder meetings, Adnan consistently anchored conversations in the shared goals and purpose of the participants, and gracefully steered any hesitations back to key points of agreement. Adnan's inquisitive nature paired with his highly intentional and inviting communication techniques transformed the landscape of our project at the local level and integrated a broader number of stakeholders into the campaign.

Adnan also performed well as a member of a team of three students and two supervisors. He was always willing to take a supporting role when it benefited the team and eagerly took responsibility for new or outstanding tasks when he sensed that his teammates were taking on too much or needed assistance. Adnan's commitment to the client was evident, completing the highest value deliverables in their best interest, often times beyond the scope or mere requirements of the academic exercise.

We were impressed by Adnan's strong visionary spirit, his research and analytical skills, his excellent writing, his ability to respond professionally and competently to real-world client needs, his collaborative character, and his dedication to making meaningful change for marginalized communities. We are assured that Adnan will rise to any challenges he faces, and that he will excel as a clerk in your chambers.

Sincerely,

Jeff Selbin
Clinical Professor of Law and Director,
Policy Advocacy Clinic
jselbin@berkeley.edu

Delaney Green
Clinical Supervisor
Policy Advocacy Clinic
dgreen@clinical.law.berkeley.edu

The following writing sample is a memo that I drafted for the Court during my externship with the District of Nevada. It is presented with the Court's permission. Party names and certain other specifics have been removed. Analysis of certain specific procedural issues has also been removed and some of the factual background altered in order to shorten the length of the memo and focus on the substantive analysis. It is a true and accurate representation of my work.

M E M O R A N D U M

From: A. Perwez

To: Hon. Miranda M. Du

Re: On §1983: Second Amendment & ADA Claims

Date: June 7, 2022

I. BACKGROUND

Plaintiffs are suing the City of Silver and two Silver police officers on behalf of Decedent, John Doe. The current operative complaint is the Fourth Amended Complaint, which includes a (1) §1983 claim for violation of the Second Amendment right to bear arms, and (2) a newly added ADA and Rehabilitation Act claim for disability accommodation.

Defendants have moved for partial summary judgment on these two claims. They argue that Plaintiffs' Second Amendment claim is not a cognizable cause of action under §1983, noting the lack of case precedent on compensatory damages for Second Amendment claims. Defendants have also argued that the ADA claim is barred by Nevada's one-year statute of limitation.

The Court post-*New York State Rifle & Pistol* appears to indicate that whether Second Amendment claims can be compensated is more of an open legal question than Plaintiffs are trying to move for. Additionally, while the *Sharkey* decision does open the door for a more creative interpretation of what is analogous to a §1983 claim's statute of limitations, neither Plaintiffs nor Defendants adequately argue why their interpretations should be chosen over the more elegant path of uniformly applying the state's personal injury statute of limitations.

II. ISSUES

1. Can monetary damages be available under 42 U.S.C. § 1983 for alleged violations of the Second Amendment?
2. What is the applicable statute of limitations on Plaintiffs' Title II ADA claim?
3. If Plaintiffs' ADA claim is time-barred, does the doctrine of equitable tolling apply?

III. BRIEF ANSWERS

1. Potentially. Though there is no singular controlling case, the Court's decision in *New York State Rifle & Pistol*, 140 U.S. 1525, 1527 (2020), seemed to signal the possibility of compensable damages as a potential remedy to Second Amendment violations. Additionally, the cases Defendants cited were injunction-focused and compensation was deemed as insufficient rather than fundamentally inappropriate. This indicates that this is a murkier grey area than Defendants' motion makes it out to be.
2. The best applicable statute of limitations is the state personal injury one, which is two years. Defendants failed to address *Funke v. Hatten*, No. 219CV01335RFBEJY, 2021 WL 2346003 (D. Nev. June 18, 2021), which orders NRS § 651 as not being equivalent to ADA Title II. On the other end, plaintiff's reliance on the catch-all NRS §11.190 is too inadequate and broad. Utilizing the personal injury statute of limitations instead would follow strong precedent, and as the ADA claim does "relate back" by relying on the same foundational set of facts, it would still allow the claim to go forward.
3. If the Court finds the ADA claim is time-barred, equitable tolling should not apply. Equitable tolling, in Judge Du's own words, requires "extraordinary circumstances", that are not adequately argued by Plaintiffs here to warrant their invocation. *Gonzalez v. Baker*, No. 318CV00065MMDCLB, 2020 WL 59817, at *3 (D. Nev. Jan. 6, 2020).

IV. ANALYSIS

A. Second Amendment Claim

I. Overview

The Court should deny the motion for partial summary judgment, as the availability of compensatory damages for a Second Amendment claim is a more open-ended question. Plaintiffs argue the police officers' order to the Decedent to drop his pistol was a violation of his Second Amendment rights: one reasonably likely to "chill" its exercise. ECF No. 80 at 17. Defendants reply that monetary damages are not available as a legally cognizable claim for an alleged violation of the Second Amendment, and it thus fails as a matter of law. ECF No. 82 at 3.

Upon closer analysis, the string cites the Defendants use fail to stand up to scrutiny. Subsequently, the Court must consider whether Defendants are indeed correct, or whether monetary damages may be available. This requires an analysis of recent developments in Second Amendment law. As the legal issue turns out to be more of an open question post-*New York State & Rifle,* the Court should deny the motion for partial summary judgment.

II. Are Monetary Damages Available Under § 1983 for a Second Amendment Violation?

a. Parsing the Central String Cite

Defendants' argument rests on the premise that monetary damages have not historically been available for Second Amendment violations. They support this claim in their motion with one central long string cite. *Id.* As the string cite forms the bulk of the precedent they rely so heavily on to make their case, we will dissect these closely.

The six cited cases can be thematically sorted into two broad categories. The first category are cases in which citizens sought to challenge a state law they believed violated their

Second Amendment rights. Three cases fall under this category. First is *Rhode v. Becerra,* 445 F. Supp. 3d 902 (S.D. Cal. 2020), where California residents sued against a state law regulating ammunition. Second is *Duncan v. Becerra*, 366 F. Supp. 3d 1131 (S.D. Cal. 2019), involving California residents who sued against a state law banning large capacity magazines. And third is *Richmond v. Peraino*, 128 F. Supp. 3d 415 (D. Mass. 2015), where Massachusetts gun owners sued against a state law barring those who have been in possession of a controlled substance from having firearms.

The second thematic category are cases in which citizens sued police for denying or interfering with their firearms license application. The rest of the three cases fall here. The first is *Fisher v. Kealoha*, 855 F.3d 1067 (9th Cir. 2017), where applicants for firearm license sued the City and police department for denial of their applications. The second is *Grace v. D.C.,* 187 F. Supp. 3d 124 (D.D.C. 2016), where citizens sued the police chief against a law granting him discretion to refuse licenses to carry concealed handguns. The third is *Napolitano v. Ryder,* No. CV183607SJFAKT, 2019 WL 365710, at *6 (E.D.N.Y. Jan. 30, 2019), where plaintiff sued the police commissioner for not returning his pistol license after he served his suspension.

The fact patterns in both categories clearly differ extensively from the case before the Court. For one, all but *Napolitano* are collective in nature—they are explicitly litigated on behalf of a larger class of citizen plaintiffs. Second, they have to do with a particular constitutional violation tied to a particular local statute (whether it be regulating magazine capacity or denying licenses). Third, and most importantly, these are all injunctive cases: the relief being sought was a reversal of a particular legal action.

Given this context, the Defendants' argument that these cases prove compensatory damages are not available makes little sense. The courts in these cases never ruled that

compensatory damages are unavailable as a matter of law, but rather the reverse: that, given the "unquantifiable" nature of the interests, mere compensation alone would not be enough. *Grace,* 187 F. Supp. 3d at 149; *Napolitano,* 2019 WL 365710, at *7. Defendants then perversely use this language to argue compensation was not available, when a far more logical argument is that in these collective injunctive cases, the courts were noting that compensatory damages would not be *adequate*, rather than not *available*.

In contrast, our case is individual-focused and not related to a particular statute, where an injunction might have been the clearest way to afford relief. There is no statute the family is asking to overturn: the clearest relief here would be damages flowing from a possible violation of the Decedent's constitutional rights. Injunctive relief, in other words, may have been the most appropriate relief in the string cite cases, but it makes little sense in the context of an individual civil rights violation resulting in someone's death. This is in fact the core thrust of *Bivens* — when the government uses excessive force, the remedy should be damages, as injunctive relief would not remedy that focused violation. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics,* 403 U.S. 388, 396 (1971). Thus, the question of whether monetary compensation can be awarded for a potential violation of the Second Amendment is a much more open one.

Defendants' reliance on the string cite without any context or explanation does not bode well for the depth of their legal analysis. Defendants make the almost perversely opposite argument as to why monetary damages should not be awarded. In sum, not a single case in the string cite is analogous to the fact pattern at hand.

b. *Opening the Door*

While the string cite may be deficient, the larger question of whether Second Amendment violations can be compensated still stands. Three Supreme Court cases are key pillars to shaping

the landscape here: they are, in chronological order, *D.C. v. Heller,* 554 U.S. 570 (2008); *McDonald v. City of Chicago, Ill.,* 561 U.S. 791 (2010); and *New York State Rifle & Pistol*, 140 U.S. 1525 (2020). We will carefully follow the thread of reasoning through these three cases, to get a sense of how the Court may rule moving forward.

Heller, where the Court directly ruled on what it held to be correct interpretation of the Second Amendment, is central in laying out the parameters here. *Heller,* 554 U.S. at 576. The majority ruled that Second Amendment was fundamentally tied to individual right to self-defense of "hearth and home", as opposed to the dissent's more militia-centric approach. *Id.* at 635. *McDonald* extended this by incorporating the right recognized in *Heller* to the states. *McDonald,* 561 U.S. at 791. These two cases cleared the stage for *New York State Rifle & Pistol*.

Though the holding of *Rifle* is not itself groundbreaking—the State ended up amending the rule to comply with the injunctive relief requested, rendering the case largely moot by the time it came before the Court—the legal doors it leaves open potentially are. More particularly, the Court had a clear chance to shut down the question of whether damages are appropriate for a Second Amendment claim, but explicitly refused to take it. *New York State Rifle & Pistol,* 140 U.S. at 1526. In fact, rather than argue that damages are inappropriate, the Court instead stated that it is simply too late for petitioners to add a claim for damages, and that the lower courts may consider this on remand. *Id.* This is not simply a sidestepping or pass-the-buck approach, as Defendants try to argue. ECF 98 at 2. The Court's decision to leave the door open for petitioners to pursue damages would alone be enough to invalidate Defendants' argument that this is not a legally cognizable claim. But that the Court chose to explicitly call out timeliness and failure to expressly seek damages as the major factor here, rather than any issue with the premise of

compensatory damages (despite having a clear opportunity to do so), suggests that this in fact is a legally cognizable claim. *New York State Rifle & Pistol,* 140 U.S. at 1526.

c. *Post-Rifle Landscape*

Interestingly, most cases post-*Rifle* focused on the mechanical procedure of how a case becomes moot. *See Rentberry, Inc. v. City of Seattle,* 814 Fed. Appx. 309, 309 (9th Cir. 2020)*; see also Gjoci v. Dep't of State,* No. 1:21-CV-00294-RCL, 2021 WL 3912143, at *1 (D.D.C. Sept. 1, 2021); *see also Texas v. Biden*, 20 F.4th 928, 958 (5th Cir. 2021). There has not yet been a case that explicitly builds on the foundation *Rifle* set regarding compensatory damages. Looking ahead however, *Rifle* does indicate a dissatisfaction about the mode of review being used by the lower courts. Alito's dissent noted that the post-*Heller* framework should use tests based more tightly on text, history, and tradition, rather than the customary balancing or strict scrutiny tests. *New York State Rifle & Pistol,* 140 U.S. at 1528.

This seems to indicate a desire to restructure entirely the tests that the lower courts use. This is particularly apparent given the lack of a clear framework post-*Heller* as to whether a statute violates the Second Amendment or not. *Id.* One particular theme that has come up is analogizing it to the free speech guarantee of the First Amendment. *Duncan v. Bonta,* 19 F.4th 1095, 1113 (9th Cir. 2021). It seems that the post-*Rifle* landscape opens the door quite widely: not only that compensatory damages can be available, but that a wholescale restructuring of the tests used for the Second Amendment is coming. Because of this judicial ambiguity, the Court should deny the Defendants' motion for partial summary judgment.

B. ADA Claim

I. Overview

Plaintiffs argue that the Decedent's disability was known by the City through a Legal Hold 2000 filed eight months before, and that this should have been communicated to the officers. Defendants argue the ADA claim is time-barred; and, as Title II of the ADA has no explicit statute of limitations, they must analogize to the closest state law. They reason that NRS § 651.070 is the most analogous to the ADA claim, and a one-year limitation should thus apply. Plaintiffs push back, stating either NRS § 11.190(3)(a)'s three-year limitation should be used, or, alternatively, the state's personal injury two-year limitation. In addition to the statute of limitation issue at hand, Plaintiffs try to appeal to equitable tolling as a back-up defense.

II. Which statute of limitations should apply?

The most applicable statute of limitation is the two-year personal injury statute of limitations. This is based on both case precedent as well as the shallow evidence for alternatives. We are presented with three options for statute of limitations to choose from: Nevada's public accommodations statute (one year), the personal injury statute (two years), and the general "catch-all" statute (three years). When evaluating ADA claims, courts borrow statues of limitation from state law. *Sharkey v. O'Neal,* 778 F.3d 767, 768 (9th Cir. 2015). The first step is to determine which Nevada state law claim may be most analogous to ADA Title II. *Id.* at 770. If there is no state law that provides a better analog, the court may consider a state's personal injury statute of limitations. *Id.* at 771. Defendants argue that NRS § 651.070 is the most relevant analogous state law; they state that the "place of public accommodation" phrase in the statute refers to both public and private entities. Plaintiffs counter that the list of public accommodations does not, in fact, refer to private homes, and is thus not analogous here.

Funke v. Hatten, a case from this district, provides strong support for Plaintiffs. The *Funke* court rejected the idea that NRS § 651.070 was an appropriate analogue to ADA Title II

precisely because of a statutory interpretation that read public accommodation as not referring to private homes. *Funke v. Hatten*, 2021 WL 2346003, at *2. It then concluded that the two-year personal injury statute of limitations was "most analogous." *Id.*

The Court should follow *Funke*. Not only does *Funke* directly deal with the ADA Title II question, but Defendants' claim that "public accommodation" also refers to private entities and houses is highly suspect: it makes little sense in either the statutory text or the common usage of the word. Additionally, there is little to no counter-analysis present in the docket's "Reply" to *Funke*, which remains the clearest case here. Finally, there is a long history of similar cases relying on personal injury statute of limitations. *See, e.g.*, *Perez v. Seevers,* 869 F.2d 425 (9th Cir. 1989); *Rosales-Martinez v Palmer*, 753 F.3d 890 (9th Cir. 2014); *Wallace v. Keto*, 549 U.S. 384 (U.S. 2007); *Alameda Books, Inc. v. City of Los Angeles*, 631 F.3d 1031 (9th Cir. 2011). Using this personal injury statute of limitations will still allow the case to go forward, without relying on the already-questionable comparison of NRS § 651.070 that Defendants prefer, or the thin logical attempt by Plaintiffs trying to connect this to NRS § 11.190(3)(a).

If the Court determines that the ADA claim relates back, as the next section will argue, the statute of limitations is two years. Plaintiffs claim would then be timely, and Defendants' motion should subsequently be denied.

III. Does Plaintiffs' ADA claim relate back?

Defendants try to argue that the additional ADA claim does not relate back to the original filing. This is unpersuasive. Rule 15(c) allows amended complaints to relate back when the claim arises from the same conduct, transaction, or occurrence set out in the original complaint. Given Rule 15 is supposed to expressly and liberally help claims be decided on merits rather than procedural technicalities, and that the ADA claim refers to the same nucleus of facts that caused

this entire case to begin with, this strongly favors Plaintiffs' argument. *See ASARCO, LLC v. Union Pacific R. Co.*, 765 F.3d 999, 1005 (9th Cir. 2014). Defendants provide no strong analysis of why this should be considered not arising from the same occurrence. Combined with this and Rule 15(c)'s general posture, we should assume that the ADA claim does relate back.

IV. Is equitable tolling available?

Equitable tolling requires a high bar. As Judge Du describes, it requires "extraordinary circumstances" that are simply not present here. *Gonzalez*, 2020 WL 59817, at *3. Plaintiffs allege that the City of Silver colluded to delay the proceedings of the video, but follow this up with little evidence. ECF No. 80 at 23. It does not build beyond the conclusory allegation that it took twenty two months for the Officer Involved Shooting (OIS) investigation report to be available; nor how this would have prevented them from filing an ADA claim in specific.

Plaintiffs' lack of further detail makes this read more as a last-ditch attempt to provide a backup in case the statute of limitations argument fails, rather than a serious attempt to meet the doctrine's high bar. Regardless, if the two-year personal injury statute of limitations applies, the point is moot: the case can move forward without relying on a fragile equitable tolling argument.

V. CONCLUSION

Whether compensatory damages are available for Second Amendment claims brought under § 1983 is an open question—one that seems to lean much more towards permitting them. Either way, Defendants' cherry-picked and logically perverse string cited cases do not support their argument. In regards to the ADA claim, the Court should use the personal injury two-year statute of limitation, find the ADA claim as relating back to the date the original complaint was filed, and strike down the equitable tolling argument. The motion for partial summary judgment should therefore be denied.

The below is a Comment written for my write-on to the California Law Review. The case dealt with a recent SCOTUS decision, PennEast Pipeline Co. v New Jersey, decided in 2021. We were asked to analyze the case and its potential consequences. We were given particular simple citing mechanisms rather than Bluebook, which I followed. This sample is completely unedited, and is a true and accurate reflection of my work.

UID: 1748099

The great irony of *PennEast Pipeline*, a case so fiercely supported by pro-pipeline businesses on one side and environmental groups on the other, is that, at its core, it ended up having rather little to do with particular environmental stances at all. This is not surprising: the same arguments that may buoy the pipeline today could also one day "pave the way for aggressive expansion of wind turbine projects, solar fields" and their respective land-intensive voltage lines.[1] A short-term victory for the pipeline may well be a boon for the green energy companies of tomorrow, and vice versa: the metaphorical knife here will certainly cut deeply both ways.

The noise and fury serve as a glossy wrapper around the real heart of the case: it hands the Court a clean opportunity to settle a far deeper, older question about the shape and limits of state sovereignty in a contemporary context. Yet, in its subsequent tussle over the history and legality of the *mechanisms* of delegation, the Court fails to contend with its *consequences*: specifically how such delegation hollows the foundational idea of where democratic sovereignty itself flows from, or can be opposed by.

This Comment will argue that both the majority and the main dissent failed to fully grapple with the most troubling issue in this case — what the

[1] Helman, 71

long-term consequences of delegation of such an awesome primal power such as eminent domain to a private party, especially when the state is nonconsenting, would be. Neither the potential threat to a vision of the "cohesive national sovereign"[2] that Roberts bristles at, nor the Congressional overstepping of the Commerce Clause that Barrett is alarmed by,[3] is quite as troubling as the idea of private companies being able to forcibly overrule the will of a State — and by natural extension, the collective democratic will.

This Comment will seek to address the broader ramifications such delegation will have on core ideas of sovereignty. To do this, it will be divided into 5 parts. Part I will give a brief overview of sovereign immunity and how it ties to broader ideas of sovereignty. Part II and Part III critically analyze the Roberts majority and Barrett dissent, respectively. Part IV notes counterarguments to the claims this Comment put forth, and seeks to address them. Part V will conclude by noting alternatives, as well as giving a bird's eye view of how this decision fits into a larger need to rethink sovereignty in a hyper-corporate world.

PART I: SETTING THE STAGE — ON SOVEREIGNTY

Simply put, sovereign immunity is the idea that states cannot be sued against their consent. The Court has previously ruled that the immunity is broader than just the Eleventh Amendment: that it is inherent in the

[2] Majority, 27
[3] Dissent, 36

"constitutional scheme" itself, and does not depend on the structure of the suit or remedy sought.[4] The exceptions were limited: where the state has waived its immunity; where the federal government or another state sues it; or Congress has abrogated immunity in a statute grounded in the 14th Amendment by a "clear statement".[5] But both issues of sovereign immunity and eminent domain are intertwined: rooted in the same issue of what sovereignty means more generally.[6]

The idea of sovereignty immunity is thus understandably controversial: it constantly begs the question where exactly power flows from. Sovereign immunity could be seen as a form of "legalized barbarism", where a king can do no wrong because they are king. This is the point Somin makes as he contrasts such a Hobbesian idea of sovereignty with a more "enlightened" idea of sovereignty flowing from the people.[7] But the issue with this lies in its impracticality and unnecessary rigidity. A State must have particular immutable rights in order to protect its land and retain its shape and borders as a tangible political entity. This is not just to protect itself like some hypothetical entity, but the rights and possessions and security of all of the citizens that live inside it. Nor is it necessary to pit the State against the people. In a democratic society, the State need not be seen as a distinct

[4] SP 452
[5] Id.
[6] SP 574
[7] SP 47

entity from the people: rather, it is a particular (and necessary) concentration of their collective will. "State dignity" is therefore not truly about the abstract dignity of a state — it is much more fundamentally about the dignity of its people, and the democratic processes they use to channel their will.

Sovereign immunity is thus not an anti-democratic or Hobbesian idea in of itself: it depends on the *source* the sovereignty flows from. It is precisely this question — how delegating eminent domain to corporations against nonconsenting states disrupts the natural flow of democratic sovereignty — that the Comment will be primarily concerned with.

PART II: PENNEAST PIPELINE — MAJORITY

Roberts sets forth his majority opinion in two steps. He first sets a foundation by stating that nonconsenting States specifically surrendered their immunity from federal eminent domain power when they chose to ratify the Constitution. It cannot be overemphasized just much how this historical interpretation serves as the singular premise; the entirety of the majority opinion rests on it to strip the sovereign immunity of States away. It is how Roberts tiptoes around *Seminole Tribe*, stating that the latter was predicated on Article I powers, whereas here the States had already consented "in the plan of the Convention" to federal domain power.[8] Having

[8] SP 20

set forth this seemingly self-explanatory premise of surrendered immunity, Roberts ties the case's decision directly to the Constitutional vision of a "cohesive national sovereign".[9] In other words, a State resisting the pipeline would be an affront to not only a corporation, but, through the idea of delegation, the idea of a cohesive national sovereign itself.

There are two glaring blind spots here. First, Roberts makes no distinction between the power of the federal government and the power of a *delegate* of the federal government. The latter is seen as a simple and direct vessel, in every way, of the former: and thus, any threat to it is directly tantamount to a threat to the latter. But this is a highly questionable premise. Vesting a delegate with a particular federal power inherently deals with a very limited and particular circumstance. It is a fragile and constrained power. There *is* a tangible change that happens in the act of delegation itself; the federal government entrusts a private party with a particular charge and duty. It does not provide with it the full power of the constitutional vision. The private party is only so much an extension of the federal government in so much as it coincides with the extent of how much it fulfills its particular duty: no more, no less. A State may conceivably resist the intrusion of such a delegate for a myriad of reasons: perhaps the

[9] SP 27

corporation in charge of the project is corrupt, or blackmailing state officials, or delaying a project indefinitely.

Not only is the mere act of resisting a delegate not equivalent to resisting the full weight of the federal government itself, to do so is a wickedly dangerous proposition: it imbues whatever particular structure or practices said corporate delegate has as emanating from the collective will of the people. By painting delegation as an extension of federal sovereignty rather than a temporary and restrictive loan, Roberts heightens the stakes of any opposition to it immensely. Ironically enough, this move actually weakens the vision of a federal cohesive sovereign in the long run. By tying the two so closely, when projects of such delegates are resisted and shut down in other ways — such as New Jersey withholding permits to cross waterways[10] — it can now be seen as tangible cracks and threats to federal sovereignty, rather than simple resistance to the project at hand.

Second, Roberts' reliance on nonconsenting States surrendering to eminent domain at ratification is highly questionable. There is of course the question of simple historical timeline: examinations of historical documents at the time show that eminent domain was not an issue Britain abused, and therefore not a major concern to the States at the time of ratification.[11] Additionally, the doctrine of eminent domain itself had a long, circuitous

[10] SP 56
[11] SP 403

history: the compensation requirement, for example, was constantly forged and reforged in the light of different laws the course of the 19th century.[12] How then could the States have surrendered such an essential power, when the doctrine was neither pertinent nor developed at that time? Part of the problem lies not only in the substance of the justification but the extent to which Roberts relies on it. The majority set it out as some sort of self-explanatory, indisputable historical fact. Most of the opinion does not even focus on backing up this historical claim; the closest that is done is an awkwardly placed parallel between the idea behind the Taking Clause as proving that the federal government had wielded and delegated eminent domain in this way from the beginning.[13]

Moreover, even in this hypothetical surrender theory, Roberts decides to yet again make no distinction between the States surrendering to the federal government or the States surrendering to *private corporations*, even against the State's own will. This is particularly concerning giving the contemporary rise of the power and complexity of corporations: if the States could barely foreseen the eminent domain theory as it is now practiced, how they could they have ever foreseen what a modern corporate-led takeover of their lands may look like? Not only is the Roberts surrender theory historically dubious, it relies on the States giving up the most visceral of

[12] SP 381
[13] SP 13

rights (their own land) to a theory that had not even been developed yet, to an entity (a modern corporation) that had not even existed yet. To put forth such a brittle reading of history is ill-advised at best; to rely on it, as if it was a self-evident truth, to strip States away of a core sovereignty in favor of private corporations is downright deadly. Like much of the rest of the Roberts opinion, it eats away at State sovereignty in a way that compromises both the integrity of the State's will itself in the short-term, as well doing damage to the Constitutional vision of a federal sovereign it ostensibly seeks out to protect in the long-term.

PART III: PENNEAST PIPELINE — DISSENT

In contrast to Roberts, Justice Barrett's dissent does at least raise up the concerns around state sovereignty. At times, it even gestures towards (if only briefly) the problems rising from such a delegation. Still, the majority of the dissent focuses on the constitutional authorization of the Commerce Clause as being the problem, rather than the broader questions of sovereignty such delegation would inevitably cause. Thus, though the dissent is oriented in the right direction, it is missing pieces to address the heart of the issue.

The Barrett dissent does a strong job of pointing out the flaws of the Roberts opinion in regards to its ratification-surrender theory. The dissent notes that eminent-domain power does not "stand-alone"; there is no

"Eminent Domain Clause" that would be akin to the Bankruptcy Clause.[14] Additionally, the dissent rightfully points out the absence of case precedent on this particular issue — unlike the opinion that nearly obfuscates the issue by pointing to a variety of cases where private parties exercised eminent domain more broadly, there is no case about a private party bringing a condemnation suit against a State.[15] The dissent could and should have gone even farther— not only is there private condemnation case, this is the only applicable one against a *nonconsenting State*.[16] Additionally, the dissent very rightfully points out (and in doing so, comes closest to gesturing towards the actual sovereignty-related problems coming from this form of delegation) the absurdity in that the federal government could always simply directly obtain the land itself.[17]

For all of its strengths, the Barrett dissent still does not hit the mark. It fails to grapple with the very real foundational problems that come from delegating such sovereignty to corporations against a non-consenting democratic state. The closest the dissent gets to this is pointing out that the eminent domain power belongs to the United States rather than PennEast,[18] though it then quickly cuts this line of thinking rather than taking it to a

[14] SP 36-7
[15] SP 37
[16] SP 79
[17] SP 39
[18] SP 40

larger conclusion about the anti-democratic effects of PennEast wielding such unchecked power.

The logic the dissent fails to address is as follows. If sovereignty flows from the people, then either a States-first or federal-first model both represent only different forms of diagramming that theory. And if the federal government deems to delegate its power to a corporation for reasons of efficiency, then it continues to serve that theory as long as it has the tacit consent of the federal government (composed of the people) and the state government (composed of the people). But it is precisely when a private corporation does not have one of the consents that this natural flow of sovereignty is disrupted. Upon delegation, any forcible imposition then becomes tantamount to cloaking the private company with sovereignty. This is only heightened given the relative lack of federal involvement after the delegation occurs, as well as the rise of the complexity and power of modern corporations. With enough delegation — say a not-too-far-off scenario, where the federal government had to seize thousands of miles of land for aforementioned voltage line to give to green energy companies against states' will — it would make corporations sovereign entities in their own right. And what exactly would be the mechanism for the people of a State to resist such an encroachment? What happens if there is only one corporation capable of fulfilling such a contract, and it begins to bargain for more power

in exchange for its performance? More foundationally, where does it leave us on questions of how sovereignty flows, or who can resist what?

By focusing on the mechanisms of the Commerce Clause rather than the broader policy implications, the dissent trades a tighter dissent for one that would raise broad, pressing concerns about the effect this decision has on our ideas of sovereignty and democratic will.

PART IV: COUNTERARGUMENTS

There are three major counterarguments against the idea that the *PennEast* decision is a significant attack on ideas of sovereignty. They revolve around consequences, sovereign immunity, and property. This part of the Comment will seek to briefly address them.

There may be a question of how much this actually matters. After all, the Pipeline was eventually canceled even post-Court decision, in large part due to the State exerting the variety of other powers it has — regulation, permits, and other logistical hurdles it could wield.[19] This point has some justification: even if the State loses its sovereignty to a corporation in theory, it can still successfully resist it in more practical ways. It is a good reminder that the Court's decision is not automatic. Still, the problem extends beyond just this case: the decision hollows out sovereignty in the long-term. Delaying through permits and regulations is only a band-aid

[19] SP 58

solution. There may not always be mechanisms to do the same in other industry uses. The precedent of private corporations forcibly overriding public will also shift the more delicate balance of social norms and expectations. Once again, long-term, this can erode *ideas* of who is sovereign or who is not in the minds of the people — as dangerous to the abstract underpinnings of a democratic nation as any Court's decision.

A second argument is a critique of sovereign immunity: that it "prioritizes the states over the people for no discernible reason".[20] In this reading, the decision's effect is minimized because it still protects the sovereignty of the federal government — and thus the sovereignty of the people. In response, we once again point to the fallacy of creating such a sharp distinction between people and state. In a democratic society, the state is a concentrated expression of the will of the people. The people's will cannot be articulated *except* through the form of the state — there is no ether where it can simply exist by itself. A threat to state sovereignty is thus a direct threat to the way its people have chosen to wield their will. Additionally, the sovereignty is not simply tilting back to the federal government — by the inclusion of a third party, it is creating a new tributary to flow into. One may try to argue, as Somin attempts, that the pipeline

[20] SP 307

could be tantamount to a suit "by its own citizens" because two of the five firms are New Jersey-based.[21] This is

A third counterargument is one PennEast itself uses: that the lawsuit is an *in rem* proceeding against the property itself, rather than haling the state into court.[22] This is the weakest out of the three counterarguments. Part of the rationale behind just compensation in eminent domain theory is that even money is still a form of property, and thus essential to repay when taken from the state.[23] If money is property, then how much more would actual raw dirt be? In a nation-state system with rigid borders, land and political rights are inextricably intertwined. This is no Empire where borders are fluid, and land can be won or lost without affecting the adhesive bond of an unquestionable imperial sovereign. Any state exists first and foremost because it possesses its land; the sovereignty emanates from its soil, stretching over and stopping at the borders. Until a state can continue to be considered a state without borders, distinction between the property of a State and the State itself is meaningless.

PART V: CONCLUSION — LOOKING AHEAD

The Comment will conclude by looking at the potential alternatives that can help fix this shattered model of state sovereignty post-*PennEast*.

[21] SP 47
[22] SP 228
[23] 481

UID: 1748099

First and foremost, in this new world where corporations can override state sovereignty without consent, States should study the New Jersey playbook closely. What are ways they can use to make a project they don't consent to as painful and slow as possible? The bureaucratic, administrative, and regulatory powers of the State all play a key role here.

Second, the Court should seek to course correct by clarifying more clearly the distinction between the federal government and a delegate of the federal government. What exactly are the constraints and limitations of a delegate? What can cause one to lose the power of such delegation, and do States have any role to play?

Third, this case leads us to the importance of rethinking sovereignty in a corporation-centric world. When the Constitution was ratified, the world was only just transferring from an imperial to a nation-state model. The major entities that wielded power were political ones. Today, the biggest corporations are worth trillions of dollars: more than many sovereign nations. Not only are they powerful in tangible terms, but their focused goals, ability to be across all borders, and top-down leadership structure help them wield power far more efficiently than their plodding governmental counterparts. Additionally, social media and mobile devices have given corporations infinite advantages on not just hard but soft power — they can erode or change social norms through their sheer marketing presence.

In short, corporations have risen to become entities every bit as powerful as nation-states. Given their private, closed-off nature, this already carries the seeds for a broader political theory conflict: how should nation-states interact with these new corporate sovereigns? Who wields what power? This only becomes more pronounced in democracies, where ostensibly all sovereignty should flow from the people. And in cases like *PennEast*, which explicitly pits corporations against the will of said people, the conflict becomes most pronounced of all. The Court certainly needs to take this broad geopolitical shift much more seriously. But it is not limited to the Court. It necessitates new ideas of sovereignty from political theorists, lawyers, and us more generally. What is and what is not legitimate exercises of our democratic rights? How do we rein in private corporations that are not composed of nor accountable to the public? Does the old nation-state model, with its rigid borders and stultified connection to soil, need to change in order to build an appropriate counterweight to these corporate sovereigns stretching over the world already? In a world already tilting towards autocracy, a reinvigorated pro-democratic spark focused on addressing these questions has never been more burning of a need.

Applicant Details

First Name	**Penny**
Last Name	**Quinteros**
Citizenship Status	**U. S. Citizen**
Email Address	**prquinte@syr.edu**
Address	**Address** Street **19338 133rd PL SE** City **Renton** State/Territory **Washington** Zip **98058**
Contact Phone Number	**2066618292**
Other Phone Number	**2538542788**

Applicant Education

BA/BS From	**University of Washington**
Date of BA/BS	**June 2006**
JD/LLB From	**Syracuse University College of Law** **https://law.syracuse.edu/**
Date of JD/LLB	**December 31, 2022**
Class Rank	**5%**
Law Review/Journal	**Yes**
Journal(s)	**Syracuse Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Syracuse Travis H.D. Lewin Advocacy Honor Society**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

August, Elizabeth
eaaugust@syr.edu
315-382-7690

Maxa, Bradley
J_B.Maxa@courts.wa.gov
253-552-2251

Gardner, Shannon
spryan03@syr.edu
(315)4432926

Kent, Robert
robert.a.kent@ondcp.eop.gov
202-881-8815

Berger, Todd
taberger@syr.edu
315-443-4582

Hobart, Laurie
lnhobart@syr.edu
607-351-3547

References

Honorable Bradley A. Maxa (Washington State Court of Appeals, Division II)
253-552-2251
J_B.Maxa@courts.wa.gov

Robert Kent (former General Counsel, Executive Office of the President, Office of National Drug Control Policy)
518-669-8596
Rakecd91@gmail.com

Dean Shannon Gardner (Associate Dean, Syracuse University)
315-443-2926
spryan03@syr.edu

Executive Director Brian Gerling (Innovation Law Center, Syracuse University)
315-525-6573
bjgerlin@syr.edu
This applicant has certified that all data entered in this profile and any application documents are true and correct.

Penny Quinteros
prquinte@syr.edu | (206) 661-8292

June 19, 2023

Judge P. Casey Pitts
U.S. District Court
Northern District of California
280 South 1st Street, Room 2112
San Jose, CA 95113

Dear Judge Pitts:

I would very much like to come and clerk for you. I have stellar academic achievements, but what makes me a strong candidate is the life experience I bring with me.

Too often our modern life our individualities are refined and enumerated. As if by giving numbers to every aspect of ourselves we can fairly judge people. There are GPA's, law school rankings, and standardized test scores. Credit scores determine if we can buy a house, and algorithms tell us how much we have to spend on insurance each month. There are late-payment penalty amounts and student loan interest fees. My life is all about the numbers. I have a GPA of 3.956 out of 4.0. I rank in the top 1.14% of my class. I have thirteen awards for achieving the highest grade in a law school class. But those aren't the numbers I am most proud of. These are the numbers I want you to remember about me:

3 – When I was growing up, I remember fist-fighting with my sister three times over socks. You see, I am number five out of six children. And when I was growing up, we were so poor that there were periods of time where we didn't buy new socks for years. We shared. And often there weren't enough socks to go around. If a pair of socks was missing, dirty, or had holes in them, we simply didn't get to wear socks. So occasionally we would fight to determine who got to wear socks for the day and who didn't.

1/2 – Half of my siblings either didn't finish high school or became single teenage parents. At the age of ten, I would spend my evenings babysitting my niece. My parents always taught us that education was the key to advancement in life, but it wasn't a given. It was a struggle to work, and to babysit, and do homework.

14 – I was fourteen years old when I got my first job delivering newspapers. I would wake up at 4:00 a.m. every morning and deliver newspapers seven days a week. I didn't get a day off or get to go on vacation for two years. After delivering papers for two hours, I would walk to high school. In Butte, Montana this often meant working and walking to school in sub-zero temperatures.

10 – I began working at a fast food-restaurant at the age of sixteen. I worked there for ten years while in high school and struggling to put myself through my undergraduate degree. It was 40-hour work weeks, and it was days that stretched until 2 or 3 a.m. It was waking up at 6 a.m. to catch a bus to campus. Ten is the number of years that I couldn't afford health insurance or car payments. It's the number of years that, as a new adult, I built up crushing debt.

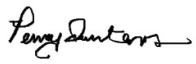
$745 – My husband is an immigrant to this country. It cost $745 in fees to be able to file his immigration papers. It took us months to save up, and I filed the paperwork myself to save money. It took five years

from when we were married until the time my husband could file for citizenship. Poverty is hard to get out of. People say it just takes hard work, but it often takes much more.

3 – The number of law schools I was admitted to. I chose to attend Syracuse University's JD Interactive program because I believe the online model will help allow people to go to law school who have somehow taken the off-ramp to a legal education at some point in their lives. Syracuse showed a commitment to making the legal profession more equitable and accessible. I wanted to contribute my hard work and dedication in support of that effort.

1 – In the end I am an individual. I've experienced hardships in my life, but this is a story about how perseverance in the face of obstacles has helped me better myself. I have achieved excellent academic grades despite many challenges. I have obtained three prestigious internships, while taking classes, participating in five extracurricular activities, and graduating a semester early. These things allow me to be in consideration for a clerkship, but my experiences and my tenacity are why I believe I would be a successful contributor to your chambers. We are all faced with opportunities to give back to our communities. I want to use my legal education as a tool to help make other people's lives less about the numbers, and I'm hoping you'll help me in that work. Thank you.

Sincerely,



Penny Quinteros

Penny Quinteros

prquinte@syr.edu | (206) 661-8292

BAR ADMISSION

State of Washington April 2023
New York and Washington, DC (in process)

EDUCATION

Syracuse University College of Law Class of 2023
Juris Doctor, *Summa Cum Laude,* 3.956/4.0 (Ranked 2nd in class of 175)

Honors & Activities

- Downey Scholarship Award 2020 and 2021 for academic achievement and diversity
- CALI Excellence for the Future Award for 13 classes
- First-Place, Bond, Schoeneck & King Alternative Dispute Resolution Competition 2020
- *Syracuse Law Review*, Executive Editor, Published in *Volume 73*
- Student Bar Association, Class of 2023, JDi Vice President
- Travis H.D. Lewin Advocacy Honor Society, Virtual Advocacy Division Director
- Graduated one semester early from hybrid program

University of Washington
Master of Fine Arts, *Creative Writing and Poetics* 2015
Bachelor of Arts, *Political Science* 2006

EXPERIENCE

Innovation Law Center at Syracuse University Feb. 2023 – Present
Fellow and Program Manager

- Perform legal research for the Office of Technology Transfer on inter-institutional agreements
- Draft and edit intellectual property reports for business clients developing new technologies

TeachPrivacy Jan. 2023 – Present
Fellow

- Analyze international cyber privacy laws for development into privacy curriculum

United States, Department of Justice June 2022 – Sept. 2022
Intern, Human Rights and Special Prosecutions

- Drafted memos regarding domestic and international law and treaty
- Advised on suitability of prosecution based on evidentiary research

White House, Executive Office of the President Jan. 2022 – June 2022
Legal Intern, Office of National Drug Control Policy

- Advised senior staff on legal matters related to national drug policy and federal expenditures
- Conducted legal research and drafted memo on advisability of a presidential executive order

Honorable Bradley A. Maxa, Washington State Court of Appeals, Division II May 2021 – July 2021
Summer Law Clerk

- Researched and drafted bench memos later turned into opinions using chamber style guides

Temporary Work & Uber Driver 2015 – 2020

Social Security Administration July 2007 – May 2013
Teleservice Representative

- Researched evolving administrative policy for use in various factual situations
- Contributed to rewriting operations manual for government's "plain language" guidelines

INTERESTS

Collaborative Writer for Books | Mixed Media Artist | Volunteer Poetry Teacher

SYRACUSE UNIVERSITY
Office of the Registrar
Advising Transcript

Advisor(s): **Not Assigned**

Quinteros,Penny R **58054-1794** **Transcript Print Date: 01/19/2023**
Law Record

Law
Major: Law
Degree Awarded: Juris Doctor Award Date: 12/21/2022 Honors: Summa Cum Laude

Fall 2019-Law

Civil Procedure	LAW601 SEC M601	4.0	A
Torts	LAW608 SEC M602	5.0	A
Legal Foundations	LAW693 SEC M600	2.0	P

Academic actions for term:
06/04/2019 Matriculation
Attempted: 11.0 Earned: 11.0 GPA Credits: 9.0
GrPts: 36.0000 GPA: 4.000
Dean's List

Spring 2020-Law

Contracts	LAW603 SEC M601	5.0	A
Leg.Communications&Research I	LAW609 SEC M603	2.0	A
Legal Applications	LAW793 SEC M600	3.0	P

Attempted: 10.0 Earned: 10.0 GPA Credits: 7.0
GrPts: 28.0000 GPA: 4.000
Dean's List

Summer 2020-Law

Property	LAW607 SEC M601	5.0	A
Leg.Communications&Research II	LAW609 SEC M603	2.0	A-

Attempted: 7.0 Earned: 7.0 GPA Credits: 7.0
GrPts: 27.3340 GPA: 3.905

Fall 2020-Law

Constitutional Law	LAW602 SEC M602	3.0	A
Criminal Law	LAW604 SEC M602	3.0	A
National Security Law	LAW700 SEC M001	3.0	HH
Adv Legal Topics-StartVenCap	LAW994 SEC M601	2.0	HH

Academic actions for term:
11/09/2020 Data Change
Attempted: 11.0 Earned: 11.0 GPA Credits: 6.0
GrPts: 24.0000 GPA: 4.000
Class Rank 1 out of 191 **Dean's List**

Spring 2021-Law

Commercial Transactions	LAW704 SEC M602	4.0	A
Professional Responsibility	LAW746 SEC M602	3.0	A
Nat'l Security Research Center	LAW822 SEC M001	3.0	HH*
Law Writing Requirement			
Pro Skills: Model Rules	LAW893 SEC M603	1.5	HH
Pro Skills: Negotiation	LAW893 SEC M602	1.5	HH
Adv Legal Topics-Arbitration	LAW994 SEC M601	2.0	HH

Attempted: 15.0 Earned: 15.0 GPA Credits: 7.0
GrPts: 28.0000 GPA: 4.000
Class Rank 1 out of 181 **Dean's List**

Summer 2021-Law

Leg.Communications&ResearchIII	LAW690 SEC M602	2.0	A
Constitutional Law II	LAW699 SEC M601	3.0	A
Const/Crim/Pro-Adj.	LAW796 SEC M601	3.0	A
Externship Seminar	LAW901 SEC M601	1.0	HH
Externship Program Placement	LAW902 SEC M601	5.0	P

Attempted: 14.0 Earned: 14.0 GPA Credits: 8.0
GrPts: 32.0000 GPA: 4.000
Dean's List

Fall 2021-Law

Const Crim Pro Inv	LAW708 SEC M601	3.0	A-
Business Associations	LAW712 SEC M602	4.0	A
Real Estate Transactions	LAW747 SEC M601	3.0	A
Adv Leg Topics-EmploymentDiscr	LAW994 SEC M602	2.0	HH

Academic actions for term:
10/27/2021 Data Change
Attempted: 12.0 Earned: 12.0 GPA Credits: 10.0
GrPts: 39.0010 GPA: 3.900
Class Rank 1 out of 167 **Dean's List**

Continued on next column

Spring 2022-Law

Administrative Law	LAW702 SEC M602	3.0	A-
Deposition Practice	LAW714 SEC M602	2.0	HH
Law Review	LAW952 SEC M001	1.0	P

Attempted: 6.0 Earned: 6.0 GPA Credits: 3.0
GrPts: 11.0010 GPA: 3.667
Class Rank 2 out of 175

Summer 2022-Law

Evidence	LAW718 SEC M602	4.0	A

Attempted: 4.0 Earned: 4.0 GPA Credits: 4.0
GrPts: 16.0000 GPA: 4.000

Academic actions since last term enrolled:
09/01/2022 Discontinuation - Non Attendance
09/16/2022 Data Change

** Law Record Credit Summary **

Total Units Earned:	90.000	GPA Credits:	61.0
Transfer Credit:	0.000	Grade Points:	241.3360
Other Credit:	0.000	Cumulative GPA:	3.956

End of Law Record
End of complete transcript record

****** NOT AN OFFICIAL TRANSCRIPT. FOR INTERNAL PURPOSES ONLY. NOT TO BE RELEASED TO ANOTHER PARTY ******

Syracuse University
COLLEGE OF LAW

June 11, 2022

Re: Penny Quinteros Clerkship Application

Dear Judge:

I am writing this letter of recommendation in support of Penny Quinteros and her application for a clerkship in your chambers. Penny has taken two courses with me during her time at Syracuse University College of Law. She participated in my one-week intensive negotiation course in January 2021 and then took my Legal Communication and Research III course focusing on contract drafting in Summer 2021. Penny was also one of two members of my transactional competition team in Spring 2022. Through these interactions I have seen the proficiency with which Penny researches and analyzes the law and then communicates that analysis both verbally through negotiation and in writing in her contract drafting. I have also gotten to know Penny personally over the past 18 or so months and I feel that I have a good sense of who she is and what her strengths are. Based on that knowledge, I highly recommend Penny for a clerkship in your chambers.

I would characterize Penny as being in the top 1% of all law students I have taught over the past 22 years, if not at the top. She has an incredible ability to process information quickly, which alone is impressive, but she also has a great thirst for knowledge and a desire to truly understand the issue at hand. Her quest for understanding and her great attention to detail make her a very strong legal researcher. In addition, her writing skills are exceptional. Penny received a High Honors in my negotiation course, which was graded on an Honors, Pass, Fail scale, but if the course would have been graded on an A-F scale she would have had the high "A." She did receive the high "A" in LCR III, which I co-taught. The first half of the course was appellate brief writing, and the second half was contract drafting and Penny received the highest grade in both modules, indicating her ability to write well in multiple contexts. Finally, Penny was absolutely the backbone of my transactional team of two members and two alternates. She helped her teammates think outside of the box for solutions, conducted essential research, helped everyone manage the timeline of the project and negotiated magnificently with her teammate and opposing counsel.

In addition to her evident intelligence and strong academic skills, Penny is a hard worker who will put in the time needed to get any job done. She works well with others, and, while she is often doing the lion's share of the work, she does not hog credit and instead makes a point to highlight the contributions of her colleagues. I imagine that would make her a good employee and co-worker. She has always conducted herself with professionalism and respect in all my interactions with her, and I believe she would represent your chambers admirably.

I enthusiastically recommend Penny for a clerkship in your chambers. If I can be of further assistance or provide any additional information about Penny, please let me know. You can reach me at 315-382-7690 or Eaaugust@syr.edu.

Kind regards,

Elizabeth A August

Elizabeth A August
Teaching Professor
Dineen Hall, 950 Irving Ave., Syracuse, NY 13244 T 315.443.2524 law.syr.edu

March 15, 2023

The Honorable P. Casey Pitts
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

Dear Judge:

I am writing to strongly recommend Penny Quinteros for employment as one of your law clerks.

Penny served as my law school extern at Division 2 of the Court of Appeals in the summer of 2021. I treat my externs like law clerks, so Penny wrote prehearing memos and draft opinions during her time here.

Penny has outstanding academic credentials, ranking number 2 in her class at Syracuse University Law School and serving as on the Syracuse Law Review. Penny's academic abilities formed the foundation for her excellent work as my extern.

During her time as my extern, Penny demonstrated three attributes that will make her an outstanding law clerk. First, Penny is an excellent legal writer. Her writing is clear, concise, and well organized. You will be able to rely on her to prepare strong drafts of orders and opinions.

Second, Penny has outstanding analytical abilities. She is good at identifying, understanding, and analyzing legal issues and then developing approaches to resolving those issues. She also was able to clearly communicate her thoughts and discuss difficult issues with me.

Third, Penny has a strong work ethic and works independently very well. I do not give my law clerks and externs much guidance before they submit drafts to me, and Penny thrived in that atmosphere.

Penny was an excellent Court of Appeals extern. I believe that her experience here as well as her intelligence and legal abilities will make her very valuable as your law clerk. Please do not hesitate to call me if you have any questions or would like to discuss Penny in more detail.

Very truly yours,

Judge Bradley A. Maxa

Bradley Maxa - J_B.Maxa@courts.wa.gov - 253-552-2251

[Writing Sample – This is a writing sample of a longer appellate brief assignment. I have omitted several areas for brevity, but left in some areas for context. Please ignore any formatting shifts due to deletions.]

[Omitted introductory pages]

I.
ISSUE PRESENTED FOR REVIEW

Did the district court misapply this Court's precedent by denying Appellant's Motion to Suppress interrogation statements made without a *Miranda* warning where armed agents swarmed Appellant's house with guns drawn, handcuffed him, secluded him in the basement of his home, and prevented him from leaving?

II.
STATEMENT OF THE CASE

A. Statement of Facts

Todd Mizro jerked out of sleep early one morning to loud banging on his front door. R. at 7. Startled awake and dressed only in his underwear, Mizro raced downstairs to answer. *Id.* A swarm of law enforcement agents stormed through with weapons drawn. *Id.* at 7-8. Mizro, a second-generation business owner and a charitable fixture at Golisano's Children's Hospital, had never before been in trouble with law enforcement. *Id.* Confronted by agents brandishing guns he froze in shock. *Id.* Law enforcement agents had arrived at his home to execute a search warrant, and within mere minutes, before the sun even rose, Mizro was grabbed, searched, and handcuffed. *Id.* He was led into the secluded basement of his home, questioned for nearly three hours, and ordered to answer the agent's questions. *Id.*

[Omitted additional facts]

B. Rulings Presented for Review

Appellant presents for review the district court's order denying Defendant's Motion to Suppress his statements to law enforcement agents. R. at 3-4. The district court ruled that Mizro's statements should be admissible even though Mizro was not given his *Miranda* warnings because the court found that Mizro was not in custody. *Id.* This ruling was based on the reasoning that a defendant being interrogated in his home wasn't in a custodial setting and that Mizro was not restrained after the removal of the handcuffs. *Id.*

III.

SUMMARY OF ARGUMENT

The constitutional right against self-incrimination is one of our most enshrined liberties guaranteed us by the Bill of Rights. The United States Supreme Court has established that in order to uphold this protection, all persons subjected to custodial interrogations must be told, in no uncertain terms, that they have the right to remain silent and the right to consult with an attorney. Mr. Mizro was not afforded that protection.

Law enforcement agents crossed every line and violated every factor of the standard set for establishing custody during their interrogation of Mizro. To evaluate if an interrogation was custodial, courts must look at all relevant circumstances in totality and determine if a reasonable person would have felt as if their freedom was restrained to a degree associated with arrest. Here dozens of relevant actions by government agents indicate Mizro's freedom was so restrained.

The circumstances indicating Mizro's custody are numerous. Mizro was in custody because fifteen armed officers in tactical style gear swarmed his house with weapons drawn. In executing a search warrant, they seized custody of Mizro's home and left him nowhere to retreat. Agents handcuffed him, physically searched him, and restrained him through an armed escort.

Mizro was ordered to get dressed for interrogation, he did not volunteer. He was intentionally secluded in the basement of his home and separated from his wife. He was denied the opportunity to make a phone call to his attorney, take a water break, and speak with his wife. He was confronted with prepared bank records creating a tone that officers were there to purposefully interrogate him. He was interviewed for a duration approximately six times the length of a standard non-custodial interview. And lastly, agents failed to inform Mizro throughout the entire ordeal, that he was free to leave and was not arrested.

Each of the above identified circumstances has been identified through precedent as weighing in favor of custody and therefore this Court should protect Mizro's right to remain silent and suppress all statements made during this custodial interrogation.

IV.

ARGUMENT

The District Court Erred in Denying Mizro's Motion to Suppress Because Agents Violated Every Standard and Crossed Every Line Set by This Court When They Swarmed Mizro's House With Guns Drawn, Handcuffed Him, and Secluded Him in the Basement of His Home for an Interrogation Without his *Miranda* Warnings, and This Court Should Reverse.

Todd Mizro was in custody during the police interrogation and the statements as a result should be suppressed. Police may not interrogate a suspect who has been taken into custody without first warning the person of their *Miranda* rights. *Miranda v. Arizona*, 384 U.S. 436 (1966). Upon appeal, whether a person is in custody and entitled to a *Miranda* warning is a question of law, and an order denying a motion to suppress is reviewed *de novo*. *United States v. Newton*, 369 F.3d 659, 668-69 (2d Cir. 2004). The correct remedy for a violation of *Miranda* rights is suppression of the improper statements. *Oregon v. Elstad*, 470 U.S. 298, 307 (1985).

A suspect is in custody if two conditions are met: (1) a reasonable person in the defendant's position would not have felt free to leave, and (2) a reasonable person would have

understood their freedom to have been curtailed to a degree associated with arrest. *United States v. Schaffer*, 851 F.3d 166, 173 (2d Cir. 2017). The first condition indicates a person was seized, and the second condition indicates if the circumstances surrounding the seizure amounted to custody. *United States v. Faux*, 828 F.3d 130, 135 (2d Cir. 2016). Not every seizure results in custody, so the ultimate question is whether a reasonable person would have believed their freedom of movement was limited as if under arrest. *Schaffer,* 851 F.3d at 175.

All circumstances surrounding the degree a person's freedom was curtailed must be examined to determine if custody existed. *J.D.B. v. N. Carolina*, 564 U.S. 261, 270-71 (2011). Relevant considerations have been identified as: the location of the interrogation, such as at the person's home, in public, or in a police station; whether the person interrogated was restrained or handcuffed; whether weapons were drawn or present; the duration of the interview whether agents told the person they were free to leave; and whether a person's freedom of movement was constrained. *Faux*, 828 F.3d at 135; *Shaffer*, 851 F.3d at 173-74.

The specific circumstances of the events in the home are evaluated for home interrogations. *Orzco v. Texas*, 394 U.S. 324, 327 (1969) (questioning by police in defendant's own bedroom in the early morning found to be custody because defendant was not free to leave). The protections afforded by being in one's own home are "hollow" if a person is unable to exclude law enforcement because it leaves nowhere to retreat. *Faux, 828 F.3d at 135-36.* If a home interrogation is not cooperative and there are speech or actions indicative of intimidation, coercion, or restricting of the defendant's freedom of movement then the general finding of no custody in the home can be overcome. *United States v. Mitchell,* 966 F.2d 92, 98-99 (1992).

The location of an interrogation is also relevant to determine if it was in a private or public place. *Cruz v. Miller,* 255 F.3d 77, 82 (2d Cir. 2001). Being questioned in a private place

is more likely to lead to a finding of custody because a public place can decrease the risk an interrogation will resort to abusive tactics of fear of such tactics in the defendant. *Id.* (questioning defendant on the street was more protective of his rights than if questioned in a private place because defendant had less to fear).

Being physically restrained is strongly indicative of custody. *Familetti*, 878 F.3d 53, 61 (2d Cir. 2017). Handcuffs are the hallmark of custody. *Id.* Being physically touched by officers and being surrounded by officers are also forms of restraint. *United States v. Ali*, 86 F.3d 275, 277 (2d Cir. 1996).

The use of physical restraints at any time during the interrogation is evaluated to determine if it would make a suspect feel intimidated, coerced, or as if their freedom of movement is restricted. *Familetti,* 878 F.3d at 61; *New York v. Quarles*, 467 U.S. 649, 652, 655 (1984). Such findings of intimidation, coercion, and restricted movement can continue the state of custody even if restraints are removed. *Id.* A coercive environment supports finding custody where both restraint of freedom of movement and a police-dominated environment exist. *Miller,* 255 F.3d at 82 (reasoning the threatening presence of police officers, physical touching of the person, displays of weapons, and verbal tone indicative of forced compliance indicate a person is restrained and therefore in custody). A police-dominated environment is where multiple police officers are present. *Id.*

Restraint of movement does not have to be physical. *Tankleff v. Senkowski*, 135 F.3d 235, 243-44, (2d Cir. 1998). Being restricted in freedom of movement can be conveyed to a defendant through tone or actions of an officer. *Id.* Direct limitations of movements, such as refusing to allow a break or a phone call, are also strongly indicative of custody. *Schaffer*, 851 F.3d at 175

(interpreting exit blocked by boxes during a search was not custody because it was a temporary impediment not an intentional restriction and defendant allowed coffee and smoke breaks).

Other non-physical ways a person's freedom of movement is restrained are if a defendant did not volunteer for the interview, and if they were not told they were free to leave and not under arrest. *Familetti*, 878 F.3d at 60; *United States v. Cota,* 953 F.2d 753, 758-59 (2d Cir. 1992); *see also Newton*, 369 F.3d at 676 (finding custody where defendant answered door in underwear, was handcuffed and continued in restraints despite being told he was free to leave.) Not volunteering for the interrogation weighs heavily in favor of custody. *Quarles*, 467 U.S. at 652. Failure to tell a defendant they are free to leave or not under arrest also weigh strongly towards a finding of custody. *Faux,* 828 F.3d at 138.

Similarly, drawn weapons are strongly indicative of custody. *Schaffer*, 851 F.3d at 175; *Miller,* 255 F.3d at 82. An initial display of guns that are immediately holstered can lead to a finding of custody unless immediately mitigated by other factors such as a defendant volunteering for an interview after being told they are not under arrest. *Cota,* 953 F.2d at 759 (presumption of custody when defendant being handcuffed at gunpoint was overcome after handcuffs were removed because defendant was told she was not under arrest and voluntarily accompanied police officers for questioning). Even holstered weapons, if visible, fall in favor of custody. *Ali*, 86 F.3d at 277 (finding a person questioned in an airport hallway by seven officers armed with visible holstered guns was in custody).

Long interrogations weigh in favor of custody. *Miller,* 255 F.3d at 82-83. Interrogations of 30 minutes or longer are indicative of custody. *United States v. FNU LNU*, 653 F.3d 144 (2d Cir. 2011) (reasoning a 90 minute interrogation weighed in favor of custody); *Yarborough v. Alvarado*, 541 U.S. 652, 653 (2004) (indicating an interview that lasted four-times longer than

the standard 30-minutes weighed strongly in favor of custody). But interrogations lasting only minutes weigh against custody. *Familetti,* 878 F.3d at 53 (finding a pre-Miranda interview that lasted "at most several minutes" was not custodial); *Faux*, 828 F.3d at 134 (interview that lasted only 20 minutes before defendant was told she was not under arrest was not custodial).

In *United States v. Faux,* the Second Circuit drew a line between custodial and non-custodial interrogations when it found agents "just managed to toe the line" when interrogating the defendant in her home during execution of a search warrant. 828 F.3d at 132. In that case the defendant was fully dressed and outside loading her vehicle for vacation in the early morning hours. *Id.* at 132-33. Approximately 10-15 armed agents arrived to execute a search warrant. *Id.* Faux was separated from her husband, but allowed to move about her home while escorted. *Id.* at 137. She was interviewed at her dining room table for 20 minutes before she was told she was not under arrest, but she chose to continue. *Id.* at 138. At no time was she handcuffed, nor did agents display their weapons or use force *Id.* The court in *Faux* reasoned that the home is a constitutionally protected sanctuary and that being free to leave an interrogation is a hollow right if one cannot retreat and exclude law enforcement from their home. *Id.* at 135-36. The court concluded that the reason Faux was not in custody was that she voluntarily chose to abort her vacation to keep an eye on her belongings. *Id.* at 138.

Similarly, in *United States v. Familetti*, the Second Circuit identified what qualifies as a "close call" for custodial interrogations during a search warrant execution. 878 F.3d at 56. When agents arrived, the defendant had a severe panic attack and agents pushed him against the wall and temporarily handcuffed him. *Id.* They advised him he was not under arrest and that he was free to leave. *Id.* They brought him a glass of water and waited for him to calm. *Id.* He was un-handcuffed, brought to his bedroom and again told that he wasn't under arrest. *Id.* Familetti

agreed to voluntarily answer the agent's questions and then was advised of his *Miranda* rights. *Id.* at 56-57. The court reasoned that the initial use of force was indicative of custody. *Id.* at 61. But the court held that since Familetti was in his own home, advised multiple times he was not under arrest, and the interview lacked coercion or intimidation it was non-custodial. *Id.* at 61.

In the case presently before the Court, agents had Mizro in custody during his interrogation. They crossed every line and violated every standard set by this Court regarding custodial interrogations. Under a standard of *de novo* review this Court should review the totality of the circumstances surrounding Mizro's statement and offer no deference to the district court's findings. This Court should reverse the district court's ruling because it misapplied precedent. The district court considered only that Mizro was in his home and his handcuffs were removed neglecting to look at the totality of the circumstances. This Court should rely on four reasons to find Mizro was in custody and entitled to a *Miranda* warning. First, Mizro's home was seized and he was secluded in it. Second, agents grabbed, searched, handcuffed, and continuously restrained Mizro. Third, agents interrogated Mizro for a duration nearly six times as long as that of a standard non-custodial interview. And fourth, agents ordered Mizro into the interrogation, they refused his requests for breaks and phone calls, and they failed to inform him that he was not under arrest.

Addressing the first reason the district court misapplied precedent, here the specific circumstances of Mizro's interrogation in his home left him nowhere to retreat. The protections Mizro normally would have had by being in his own home were hollow because agents seized control of him home at gunpoint when they swarmed in with fifteen armed agents dressed in black tactical gear creating an intimidating police-dominated environment. From that point

forward, Mizro never had control of his own home, even to the point of not being able to get his own clothing.

This case resembles *United States v. Faux*, but the facts in this case fall more heavily in favor of custody. *Faux* was right on the line of custody when 12 armed agents met the defendant without a show of force outside while she was awake and fully dressed and they conducted the interrogation at her dining room table during a search of her home. The defendant there was not handcuffed and was not arrested at the end of the interrogation. Unlike in *Faux*, which was on the line of custody, additional factors present in Mizro's case push it past the line. Here, Mizro was startled out of sleep, undressed, met with agents who had their weapons drawn, restrained and escorted by armed agents during the interrogation. Mizro's case creates a custodial interrogation in his home because it left him nowhere to retreat in a police-dominated environment as the reasoning in *Faux* highlights. Therefore a reasonable person would have felt the conditions rose to arrest-like and a finding of custody is appropriate.

[Omitted second legal argument]

Addressing the third reason the district court misapplied precedent, here the duration of the interview was far outside the standards for non-custodial interviews. Mizro was interrogated for close to three hours, which exceeds the 30-minute non-custodial standard six times over. The court in *Yarborough v. Alvarado* indicated that an interview exceeding the standard 30-minutes was a factor weighing in favor of custody. And in *United States v. FNU LNU*, a 90-minute interview weighed in favor of custody. Mizro's interrogation was almost twice as long as that of the defendant in *FNU LNU* and was longer than the interrogation in *Yarborough*, therefore a finding of custody is appropriate.

Mizro's circumstances are similar to those of the defendant in *United States v. A1li*. In that case the defendant was taken aside, surrounded by seven armed agents, and questioned for approximately fifteen minutes. Here Mizro was also brought to a secluded location, surrounded by armed agents and questioned. The fact that Mizro was questioned for close to three hours instead of only fifteen minutes strongly weighs in favor of a finding of custody.

Short, non-custodial interviews are clearly distinguishable. In *Familetti*, for example, the defendant was questioned only for a few minutes and also the defendant was told repeatedly he was not under arrest. And in *Faux* the interview lasted only 20 minutes before agents directly told the suspect she was not under arrest and was free to leave. The fact that Mizro's interview was so much longer without being told he was not arrested leads to the conclusion he was in custody.

Interviews that are of longer duration but found non-custodial can also be distinguished from Mizro's case. For example, in *Cota* the defendant waited for six hours because she volunteered to wait for different agents to arrive. There is no indication here that Mizro volunteered to be interrogated for three hours and therefore a reasonable person under his circumstances would believe the duration of the interview created arrest-like conditions.

Addressing the fourth reason the district court misapplied precedent, here agents subjected Mizro to an involuntary interrogation while curtailing his freedom of movement. Mizro was not allowed to leave when he made requests to do so. He did not volunteer to be interviewed, but was instead ordered to get dressed and answer questions. And at no point did agents tell him he was free to leave.

[Omitted fourth legal argument and conclusion]

MEMORANDUM

TO: Professor Shannon Gardner
FROM: Penny Quinteros, Student No. xxxxxxxxx
DATE: April 11, 2020
RE: Memorandum of Statutory Privacy Law in New York

ISSUE PRESENTED

Under sections 50 and 51 of New York State Civil Rights Law, which prohibits using another's name, portrait, or picture for commercial purposes, does an artist have a monetary damages claim for violation of her privacy rights when another person uses elements of her unique self-portrait to sell stationary with an environmental message?

BRIEF ANSWER

Likely no. The artist is not instantly recognizable by the stationary's appropriated elements from her self-portrait even though the stationary is for a commercial purpose. The essence of a person's identity must be used purposefully and must evoke instant recognition of the person to sustain a privacy claim. A violation requires a portrait, picture, or name of a person be used. The use must be for commercial without a newsworthy exception.

STATEMENT OF FACTS

Our client, Vivian Thomas, is a graffiti-artist who created a unique art mural. She self-describes the art as both a "seal" and a "self-portrait." The "seal" represents her approval of earth-stewardship endeavors.

Thomas is concerned her seal/portrait has been co-opted for use on stationary without her permission. The stationary is made by Bradley Frank, who sells it and other paper products a farmer's market in Ithaca, New York and on his website. Thomas was made aware of the stationary by an Instagram follower.

Both Thomas and Frank use their artwork to promote environmentalism. Frank's website sells the stationary with the product-description: "to promote environmentalism with 2020 vision." Thomas places her artwork on the exterior of businesses or other locations. It denotes she has been to the business and she approves of the business for "showing good treatment of the earth." Her graffiti-art activism has led to over 30,000 Instagram followers who recognize her "seal" to indicate Thomas approves of an environmentally-friendly business.

A. Thomas's Artwork

The artist was Thomas. The artwork she created gives the appearance of an oblong face. In brown paint the word "vivian" represents the mouth, an incomplete triangle is the nose, and two large ovals connected by a single line represent a pair of glasses. Within the glass lenses, in brown, are the hand-written words "Vive" on the left and "le Monde" on the right. These words are surrounded by vertical brown shade lines. The artist stated "Vive" incorporates the double-entendre of her name, Vivian, as well as "long-live." Surrounding the face are, predominately green with some red, squiggly lines characterizing curly hair. Thomas stated the artwork is about one foot by one foot in size. The media is paint on various building or vehicle surfaces.

B. Frank's Artwork

The artist is unknown, but the artwork appears on Frank's stationary. The artwork he used gives the appearance of a circular earth. Fuzzy green outlines represent North and South America along with partial representations of Africa and Europe. These continents are encompassed by a solid, yet fuzzy green line. In the center of the artwork and covering the "earth" are two complete and symmetrical circles of solid black connected with two black parallel lines. In the left circle is the hand-written word "Vive" and in the right circle is hand-written "La Terre." Above and below the center parallel lines are "20"'s: read together as "2020." All of the words and numbers are in solid black. On the fuzzy green perimeter of the artwork and on the outlines of the continents are primarily red, with small amounts of green, squiggly lines. The media is unknown but presumably ink on handcrafted paper.

C. Artworks' Similarities and Differences

Some visible similarities exist between the artworks. The works use similar, or identical, words within the ovals/circles. "Vive Le Monde," is French for "long live the world." "Vive La Terre," is French for "long live the earth." The red lines on top of the green area are of a similar shade and appearance.

Despite similarities, differences in the artwork are notable. The Thomas work uses highly luminous paints, with high saturation, and high contrast to present warm tones. The green is primarily yellow-hued. The shapes are non-symmetrical resulting in overall non-uniformity. The balance of red and green lines is approximately: 1/3rd red, 2/3rds green. The green squiggles are long and flowing. The Frank work uses low luminous ink, with medium saturation, and low contrast to present cool tones. The green is primarily blue-hued. The circles are symmetrical resulting in overall uniformity. The balance of red and green lines is approximately: 5/6ths red, 1/6th green.

DISCUSSION OF LAW

It is unlikely Vivian Thomas can sustain a claim for damages against Bradley Frank for appropriation of her identity through use of her "seal." It is prohibited to use a person's "name, portrait, or picture," for purposes of advertising or trade in the State of New York based upon sections 50 and 51 of New York Civil Rights Law. N.Y. Civ. Rights Law §§ 50-51 (Consol. 2020). The offense is made illegal by section 50 and a person may sue for recovery of damages under section 51. Id. In order to recover monetary damages, Thomas must establish Frank used

her name, portrait, or picture, and she must establish Frank's use was for advertising or trade purposes.

A. Frank did not use the name, portrait, or picture of Thomas.

It is unlikely a court will find Frank used the portrait, picture, or name of Thomas. The terms "portrait" and "picture" are used synonymously to represent any "clear and identifiable likeness of a living person." Onassis v. Christian Dior-New York, Inc., 472 N.Y.S.2d 254, 259 (N.Y. Sup. Ct. 1984). "Portrait or picture" incorporates the use of sketches, cartoons, or other graphic representations of a person. Id. at 262; Lohan v. Take-Two Interactive Software, Inc., 31 N.Y.3d 111, 122 (N.Y. 2018). The statute is intended to protect against the purposeful taking of the "essence" of another's identity. Onassis, 472 N.Y.S.2d at 261. "Essence of a person's identity" is found through the quality and quantity of objective evidence showing physical characteristics resulting in identification of the living person. Cohen v. Herbal Concepts, Inc., 63 N.Y.2d 379, 384 (N.Y. 1984). Characteristics of a person's persona, such as style or objects associated with them, are not part of the "essence" of a person's identity. Burck v. Mars, Inc., 571 F. Supp. 2d 446, 454 (S.D.N.Y. 2008); Onassis, 472 N.Y.S.2d at 260 (citing Lombardo v. Doyle, Dane & Bernbach, Inc., 58 A.D.2d 620, 622 (N.Y. App. Div. 1977)). Purposeful use of "essence of identity" is intentionally seeking to replicate another's identity. Onassis, 472 N.Y.S.2d at 261. A likeness must evoke "instant recognition" of the living plaintiff to be misuse. Id. at 262; Lohan, 31 N.Y.3d at 122.

Regarding name use under section 50, a name does not need to be conjoined to an image in order for either to be improper if "exploitation of one's identity" occurs. Onassis, 472 N.Y.S.2d at 261. Using a name is improper if the plaintiff is identifiable by it. Orsini v. Eastern Wine Corp., 73 N.Y.S.2d 426, 427 (N.Y. Sup. Ct. 1947). This includes using unique identifying symbols, coupled with a name, to make a person individually identifiable. Id. No cause of action exists if the plaintiff is not recognizable from the offending picture or name. Cohen, 63 N.Y.2d at 384.

In Onassis, a company dressed up a look-a-like actress to give the appearance of Jacquelyn Kennedy Onassis in a wedding advertisement. 472 N.Y.S.2d at 257.The actress had similar facial and body features and wore her hair and clothing to replicate Onassis. Id. The court held the look-a-like's portrayal gave the impression it was Onassis herself. Id. at 261. The court reasoned the ad projected the "essence or likeness" of Onassis through a close and purposeful resemblance to reality. Id.

Showing the same approach, the Lohan court reviewed whether graphic images in a video game represented the plaintiff, Lindsay Lohan. 31 N.Y.3d at 118. One image showed a blonde woman in a fedora, denim shorts, and sunglasses being frisked, similar to the outfit Lohan wore in a famous photo. Id. The other image showed the same blonde woman in a red bikini taking a selfie on a beach, similar to a picture of Lohan on the beach in a bikini taking a selfie. Id. The court held the graphic images were not violations of section 50 because the generic graphic images were not reasonably identifiable as Lohan since there were no particular identifying physical characteristics. Id. at 123.

Likewise in Burck, a blue M&M appeared in a Super Bowl commercial in the accoutrements of "The Naked Cowboy" (a cowboy hat, cowboy boots, a guitar and underpants). 571 F. Supp. 2d 446 at 449. The court held the M&M did not use a recognizable likeness of Burck because "evoking certain aspects of another's personality is not prohibited." Id. at 452. The court further reasoned aspects of a public figures' persona "not captured in their physical features" are not protected under section 50. Id. at 453.

The Orsini court focused on the taking of a name. 73 N.Y.S.2d at 427. A wine company used the Orsini family coat-of-arms in addition to the surname on its bottles' labels. Id. The court determined this combination led to recognition of the actual family patriarch by holding "the complaint here alleging identification by coat of arms and surname satisfies the requirements of the statute with respect to identification." Id.

Here, Thomas will be unlikely to prove Frank used her name or likeness because Frank's use does not intrude on Thomas's protected privacy interests. Frank's use fails to meet the standards of: instant recognition to Thomas herself; purposeful use of the essence of Thomas's identity; and being a symbol representing misuse of Thomas's name.

Frank's artwork must result in instant recognition of Thomas's physical features in order to be misuse of her likeness. His work portrays the earth, with two black, connected circles on it. A sketch like this could be a portrait or picture under the law, but based upon the earth-appearance, it would not evoke instant visual recognition of the living Thomas. Similarities exist in the mural and stationary such as both having the appearance of glasses with words on them; however, these similarities are not physical characteristics of Thomas, but part of her adopted persona. In Lohan and Burck, style characteristics (like clothing, and objects like a cowboy hat or a guitar) were not considered part of the plaintiff's physical features. Like in those cases, Frank's use of "glasses," a style element found in Thomas's mural, does not capture her physical features.

Even if Frank copied characteristics of Thomas's adopted persona, those characteristics are not a purposeful use of the essence of Thomas's identity. Unlike in Onassis where the look-a-like actress wore her hair and clothing style to give the impression of Onassis, here there were purposeful changes to not replicate Thomas. These changes include Frank's artwork appearing as the earth and not a face; differences in the words, glasses-shape, and line-squiggles' color quantity; and changes in color and tone. These are specific variances indicating no purposeful attempt to recreate the essence of Thomas' identity.

It is also unlikely a court will find Thomas's identity was exploited graphically through use of a symbol representing Thomas. Thomas's mural is a unique identifying symbol which (when coupled with her name) makes Thomas individually identifiable. In Orsini, a wine company inappropriately infringed on the privacy of the Orsini family patriarch by using his exact, identifying coat-of-arms with his surname. The combination resulted in recognition of the specific patriarch. Here, unlike Orsini, there was no exact duplication of Thomas's seal. The fact Thomas's Instagram followers might've recognized her seal bolsters the idea Frank used Thomas's unique symbol; however, Frank's artwork only shares portions of the seal, not the full thing. Specifically, his work does not use her "vivian" signature, and there is no individual recognition of Thomas's name in the double-entendre "Vive." By Thomas's own admission it has more than one meaning. Therefore it cannot be individually recognized as just her name.

There simply is not sufficient evidence to establish Frank used the exact symbol representing Thomas's identity or she was exclusively identifiable.

A follow-up interview should be done with the Instagram follower who alerted Thomas. If an observer recognized Frank's artwork specifically as Thomas's seal and name, then it would help buttress the idea a reasonably objective fact-finder could as well. Unless information changes, it is unlikely Thomas will be able to prove Frank used her likeness or name because Frank's artwork did not evoke instant recognition to Thomas; it did not purposefully evoke the essence of her identity; and it did not use an exact replica of her seal and name.

B. Frank's use was for advertising or trade purposes.

It is likely Frank's artwork was for advertising or trade purposes. "Advertising" and "trade" purposes are two concepts, but they are used collectively to indicate improper commercial use of a person's likeness or name. Beverley v. Choices Women's Med. Ctr., Inc., 78 N.Y.2d 745, 750 (N.Y. 1991); Foster v. Svenson, 128 A.D.3d 150, 157 (N.Y. App. Div. 2015). "Advertising purpose" is using a person's likeness or name for a solicitation. Beverley, 78 N.Y.2d at 751. "Trade purpose" is using a person's likeness or name on an item to increase sales. Rubio v. Barnes & Noble, Inc., No. 14-CV-6561 (JSR), 2014 U.S. Dist. LEXIS 169147, at *8–9 (S.D.N.Y. Nov. 12, 2014).

There is one exception to commercial use of a person's likeness or name: if the use is newsworthy. Foster, 128 A.D.3d at 152. Newsworthiness is broadly construed to indicate using a likeness or name to illustrate political and social subjects. Messenger v. Gruner + Jahr Printing & Publ'g, 94 N.Y.2d 436, 441-42 (N.Y. 2000). Artwork is also a newsworthy exception. Foster, 128 A.D. 3d at 159. Artwork indicates a representation of artistic expression such as images and literature. Id. Artwork use, even when sold on objects like magnets and postcards, shields the artist from privacy violation claims. Id. at 157-58 (citing Hoepker v. Kruger, 200 F. Supp. 2d 340 (S.D.N.Y. 2002)). These exceptions do not apply if the image is "merely incidental" to underlying commercial purposes. Id. at 152

In Foster, a photographer took photos of families through their windows and widely distributed the photos. 128 A.D.3d at 152. The court held the use of the images was artwork falling outside the violation of section 50 because of the newsworthy exception. Id. at 158. The court stated "trade and advertising" are narrowly construed by courts so as to protect both the privacy of individuals and First Amendment rights. Id. at 156. Further, the court analogized to Hoepker v. Kruger to show artwork using the image of another fell outside of commercial use even when displayed on postcards and magnets in a museum gift shop. Id. at 157-58.

Finding the opposite, the Beverley court held using a doctor's name and photo on a medical center calendar was commercial use even though the calendar was about women's welfare and the defendants advocated it was a newsworthy exception. 78 N.Y.2d at 753. The court found the calendar was actually an advertisement in disguise because the name and phone number of the defendants was liberally spread throughout it in an effort to solicit new customers. Id. at 751.

Frank's use of Thomas's seal was likely for commercial purposes and the newsworthy exception does not apply because the work isn't primarily intended as art, and the social

advocacy message is only incidental to the underlying commercial purpose. The stationary's image is part of its intrinsic design making it more appealing to customers; therefore, it is for the purposes of trade. The website is an advertisement of that trade-object. The website uses the stationary's image to show customers an example of what they will be purchasing; therefore, it is part of the solicitation of that sale.

Since Frank's image is both for trade and advertising purposes, there must be a "newsworthy" exception in order for the use not to be improper. Frank's artwork is not primarily intended to be for an artistic-purpose because he offers the image only on stationary to sell at a farmer's market and online. Like in Foster, Frank's artwork is widely distributed on his website with artistic and design elements, but unlike the reasoning in Foster, where another's image was first displayed as artwork and then later copied for magnet and postcard use, here the artwork is first and only reproduced on objects with no original display. This indicates the artwork is not displayed for artistic-purposes but for fostering sales of stationary.

Additionally, the social message of Frank's work is only incidental to an underlying commercial purpose of making money. In Beverley, the social message in the calendar was added incidentally to help foster sales. Similarly here, the social message is added to the website-advertisement only where the stationary is for sale. Since the social message is only used in conjunction with the sale-intention and not elsewhere, it is reasonable to conclude the message is incidental to the purpose of selling the stationary. This conclusion is rebuttable if, for example, Frank did not make any money selling the stationary supporting the idea the endeavor was gratuitous. As the facts present, it is likely Frank used his artwork for commercial or trade purposes.

CONCLUSION

Our client, Vivian Thomas, is not instantly recognizable by the elements of her "seal" found on Bradley Frank's stationary. The seal did not evoke aspects of her physical characteristics. It did not purposefully replicate the essence of Thomas's identity. Nor did it use her name or an exact replica of her symbol. Therefore it is unlikely Frank used her name, portrait or picture in violation of sections 50 and 51 of New York privacy law even though his use will likely be for advertising and trade purposes. Further development of the case, by interviewing the Instagram follower and determining Frank's potential reasons for selling, is necessary to be more assured in the conclusion.

Applicant Details

First Name	**Mark**
Last Name	**Raftrey**
Citizenship Status	**U. S. Citizen**
Email Address	**mraftrey@stanford.edu**
Address	**Address** Street **225 Manzanita Ave.** City **Palo Alto** State/Territory **California** Zip **94306**
Contact Phone Number	**6507593541**

Applicant Education

BA/BS From	**Pomona College**
Date of BA/BS	**May 2016**
JD/LLB From	**Stanford University Law School** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=90515&yr=2011**
Date of JD/LLB	**June 10, 2023**
Class Rank	**School does not rank**
Law Review/ Journal	**Yes**
Journal(s)	**Stanford Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Owen, Dave
owendave@uchastings.edu
Letter, Dean's
deansletter@law.stanford.edu
650-723-4455
Ouellette, Lisa
ouellette@law.stanford.edu
650-721-2928
Safdi, Stephanie
ssafdi@stanford.edu
?(650) 497-9443?

References

Judge Nancy L. Fineman
Superior Court of the County of San Mateo
(650) 261-5104
nfineman@sanmateocourt.org

Judge Danny Y. Chou
Superior Court of the County of San Mateo (nomination to First District Court of Appeal pending confirmation)
(650) 261-5122
dchou@sanmateocourt.org

This applicant has certified that all data entered in this profile and any application documents are true and correct.

MARK RAFTREY
225 Manzanita Ave., Palo Alto, CA 94306 | (650)-759-3541 | mraftrey@stanford.edu

June 18, 2023

The Honorable P. Casey Pitts
United States District Court for the Northern District of California
Robert F. Peckham Federal Building and United States Courthouse
280 South First Street
San Jose, CA 95113

Dear Judge Pitts:

I am a 2023 graduate of Stanford Law School and write to apply to serve as your law clerk for 2023-2024. It would be an honor to clerk in San Jose, just miles from my hometown of Palo Alto, and to remain close to my parents in Palo Alto, my brother in Berkeley, and my partner in San Francisco.

Enclosed please find my resume, references, transcript, and writing sample for your review. Professor Lisa Ouellette, Professor Dave Owen, and Clinical Supervising Attorney and Lecturer in Law Stephanie Safdi are providing letters of recommendation in support of my application.

I would be happy to discuss my qualifications further. Thank you for your consideration.

Sincerely,
Mark Raftrey

MARK RAFTREY

225 Manzanita Ave., Palo Alto, CA 94306 | (650) 759-3541 | mraftrey@stanford.edu

EDUCATION

Stanford Law School Stanford, CA
Juris Doctor Candidate, expected June 2023
Honors: Judge Thelton E. Henderson Prize for Outstanding Performance in Environmental Law Clinic; Gerald Gunther Prize for Outstanding Performance in Environmental Law and Policy
Journal: *Stanford Law Review* (Volume 75: Articles Editor; Volume 74: Member Editor)
Activities: Environmental Law Society

University of California, Davis School of Law Davis, CA
Juris Doctor Candidate, August 2020 – May 2021
Honors: Witkin Award for Academic Excellence in Constitutional Law I (highest grade)
Journal: *UC Davis Law Review* (Invited Member)
Activities: King Hall Intellectual Property Association (Speaker Chair and Co-Career Chair); 1L Moot Court Competition (Participant); Environmental Law Society

Stanford University Stanford, CA
Master of Science in Geological Sciences, April 2020
Honors: Bob Compton Field Geology Research Grant (to support mapping and field-intensive research)
Thesis: *Character and Timing of Deformation in the Funeral Mountains Metamorphic Core Complex (MCC), Death Valley, California and Nevada* (studied the extinct Boundary Canyon Fault to better understand faults active today)

Pomona College Claremont, CA
Bachelor of Arts in Geology, May 2016
Honors: The Richard E. Strehle Memorial Award (awarded annually to "a junior or senior with the physical, mental, and moral qualities desirable in a field geologist")
Thesis: *Mesozoic silicic volcanism in the Goddard Pendant, Sierra Nevada: records of transition from high to low flux regime* (mapped and analyzed some of the last remaining volcanic rocks that once covered the Sierra Nevada mountains to fill in the tectonic and volcanic history of the region)
Activities: Pomona-Pitzer Varsity Soccer, 2011-2015 (Team Captain, 2015)

EXPERIENCE

Environmental Law Clinic, Stanford Law School Stanford, CA
Clinic Student; Advanced Clinic Student September – December 2022; January – March 2023
Submitted Title VI Complaint and Petition for Rulemaking to EPA and commented on EPA and State Water Board proposals on behalf of tribes and environmental justice groups seeking updated water quality standards.

Arnold & Porter LLP San Francisco, CA
Summer Associate June – August 2022
Completed assignments in corporate and litigation practice groups.

Superior Court of California, County of San Mateo San Mateo, CA
Judicial Extern to the Honorable Nancy L. Fineman and the Honorable Danny Y. Chou May – August 2021
Analyzed statutes, case law, and trial testimony to draft Statements of Decision. Researched California code to recommend rulings on motions.

Environmental Resources Management (ERM) Sacramento, CA
Staff Geologist October 2016 – June 2017
Worked in contaminated site management to determine ideal remediation plans and safely execute them. Modeled groundwater flow to predict contaminant spread.

Geological Sciences Department, Stanford University Stanford, CA
Geology Field and Lab Assistant June – August 2012 – 2016
Assisted three Ph.D. candidates and faculty member from Structural Geology and Tectonics group. Mapped and collected rock samples in Nevada and Idaho before processing for geochronology.

MARK RAFTREY

225 Manzanita Ave., Palo Alto, CA 94306 | (650) 759-3541 | mraftrey@stanford.edu

RECOMMENDERS

Professor Lisa Larrimore Ouellette
Stanford Law School
(650) 721-2928
ouellette@law.stanford.edu

Professor Dave Owen
University of California College of the Law (formerly University of California-Hastings)
(415) 703-8285
owendave@uchastings.edu

Clinical Supervising Attorney and Lecturer in Law Stephanie Safdi
Stanford Law School
(650) 497-9443
ssafdi@stanford.edu

REFERENCES

Judge Nancy L. Fineman
Superior Court of the County of San Mateo
(650) 261-5104
nfineman@sanmateocourt.org

Judge Danny Y. Chou
Superior Court of the County of San Mateo (nomination to First District Court of Appeal pending confirmation)
(650) 261-5122
dchou@sanmateocourt.org

UNOFFICIAL PAGE: 1

MARK EDWARD RAFTREY ID 997-324-077

PROFESSIONAL ACADEMIC RECORD

CURRENT COLLEGE(S): LAW
CURRENT MAJOR(S): LAW

ADMITTED: FALL SEMESTER 2020

INSTITUTION CREDIT:

FALL SEMESTER 2020

LAW	200	INTRODUCTION TO LAW		S	1.00	.00
LAW	202	CONTRACTS		A	4.00	16.00
LAW	203	CIVIL PROCEDURE		A	5.00	20.00
LAW	206	CRIMINAL LAW		A-	3.00	11.10
LAW	207	RESEARCH & WRITING I		A-	2.00	7.40
	COMPL	ATTM	PSSD	GPTS	GPA	
TERM:	15.00	14.00	14.00	54.50	3.892	
UC CUM:	15.00	14.00	14.00	54.50	3.892	

SPRING SEMESTER 2021

LAW	200L	LAWYERING PROCESS LAB		S	.00	.00
LAW	200S	LAWYERING PROCESS		S	2.00	.00
LAW	201	PROPERTY		A	4.00	16.00
LAW	204	TORTS		A-	4.00	14.80
LAW	205	CONSTITUTIONAL LAW I		A+	4.00	16.00
LAW	208	LGL RESRCH & WRITING II		A	2.00	8.00
	COMPL	ATTM	PSSD	GPTS	GPA	
TERM:	16.00	14.00	14.00	54.80	3.914	
UC CUM:	31.00	28.00	28.00	109.30	3.903	

********** TRANSCRIPT TOTALS **********

TOTAL UNITS COMPLETED: 31.00 UC GPA: 3.903
UC BALANCE POINTS: 53.3

********** MEMORANDA **********
UNIVERSITY REQUIREMENTS:

PREVIOUS DEGR:
BACHELOR OF ARTS 05/01/16
POMONA COLLEGE
MASTER OF SCIENCE 03/01/20
STANFORD UNIVERSITY

END OF RECORD
UNOFFICIAL UC DAVIS TRANSCRIPT COMPUTER PRODUCED ON 06/10/21 - ISSUED TO STUDENT.

MARK EDWARD RAFTREY

Leland Stanford Jr. University
School of Law
Stanford, CA 94305
USA

Law Unofficial Transcript

Name : Raftrey,Mark Edward
Student ID : 05718089

Print Date: 05/08/2023

--------- Stanford Degrees Awarded ---------

Degree : Master of Science
Confer Date : 04/02/2020
Plan : Geological Sciences

--------- Academic Program ---------

Program : Law JD
09/20/2021 : Law (JD)
Plan
Status Active in Program

Program : Geological Sciences
06/26/2017 : Geological Sciences (MS)
Plan
Status Completed Program

--------- Transfer Credits ---------

Applied Toward Law JD
Transfer Credit from UNIVERSITY OF CALIFORNIA-DAVIS
Quarter Units Posted: 40.00

Total Quarter Units Posted:

Allowable Transfer Credit subject to restrictions.

--------- Beginning of Academic Record ---------

2016-2017 Summer

Course		Title	Attempted	Earned	Grade	Eqiv
GS	400	GRADUATE RESEARCH	3.00	3.00	S	
Instructor:		Miller, Elizabeth				

LAW TERM UNTS: 0.00 LAW CUM UNTS: 0.00

2017-2018 Autumn

Course		Title	Attempted	Earned	Grade	Eqiv
GS	251	SEDIMENTARY BASINS	3.00	3.00	B+	
Instructor:		Graham, Stephan A				
GS	290	DEPARTMENTAL SEMINAR IN GEOLOGICAL SCIENCES	1.00	1.00	S	
Instructor:		Caers, Jef Karel				
GS	400	GRADUATE RESEARCH	6.00	6.00	S	
Instructor:		Miller, Elizabeth				

LAW TERM UNTS: 0.00 LAW CUM UNTS: 0.00

2017-2018 Winter

Course		Title	Attempted	Earned	Grade	Eqiv
GS	203	EARTH MATERIALS: ROCKS IN THIN SECTION	3.00	3.00	A	
Instructor:		Miller, Elizabeth				
GS	285A	VOLCANOLOGY	3.00	3.00	A-	
Instructor:		Mahood, Gail A				
GS	287	FUNDAMENTALS OF MASS SPECTROMETRY	3.00	3.00	A	
Instructor:		Grove, Martin J				
GS	400	GRADUATE RESEARCH	1.00	1.00	S	
Instructor:		Miller, Elizabeth				

LAW TERM UNTS: 0.00 LAW CUM UNTS: 0.00

2017-2018 Spring

Course		Title	Attempted	Earned	Grade	Eqiv
GS	184	FIELD TRIP TO VOLCANOES OF THE EASTERN SIERRAN VOLCANISM	1.00	1.00	S	
Instructor:		Mahood, Gail A				
GS	280	IGNEOUS PROCESSES	3.00	3.00	A-	
Instructor:		Stebbins, Jonathan F				
GS	293	ADVANCED STRUCTURAL MAPPING IN THE FIELD	2.00	2.00	A	
Instructor:		Miller, Elizabeth				
GS	400	GRADUATE RESEARCH	4.00	4.00	S	
Instructor:		Miller, Elizabeth				

LAW TERM UNTS: 0.00 LAW CUM UNTS: 0.00

2017-2018 Summer

Course		Title	Attempted	Earned	Grade	Eqiv
EMED	224	WILDERNESS FIRST AID	2.00	2.00	+	
Instructor:		Lipman, Grant S Thompson, Antja Jean				
GS	400	GRADUATE RESEARCH	8.00	8.00	S	
Instructor:		Miller, Elizabeth				

LAW TERM UNTS: 0.00 LAW CUM UNTS: 0.00

2018-2019 Autumn

Course		Title	Attempted	Earned	Grade	Eqiv
GEOLSCI	293	ADVANCED STRUCTURAL MAPPING IN THE FIELD	2.00	2.00	A	
Instructor:		Malkowski, Matthew Alan Miller, Elizabeth				
GEOLSCI	400	GRADUATE RESEARCH	8.00	8.00	S	
Instructor:		Miller, Elizabeth				

Worksheet - For office use by authorized Stanford personnel Effective Autumn Quarter 2009-10, units earned in the Stanford Law School are quarter units. Units earned in the Stanford Law School prior to 2009-10 were semester units. Law Term and Law Cum totals are law course units earned Autumn Quarter 2009-10 and thereafter.

Leland Stanford Jr. University
School of Law
Stanford, CA 94305
USA

Law Unofficial Transcript

Name : Raftrey,Mark Edward
Student ID : 05718089

LAW TERM UNTS: 0.00 LAW CUM UNTS: 0.00

2018-2019 Winter

Course		Title	Attempted	Earned	Grade	Eqiv
EARTH	203	DIVERSITY AND INCLUSION IN THE GEOSCIENCES	1.00	1.00	S	
Instructor:		Cardarelli, Emily Lewis Gonzales, Katerina Rae Welander, Paula V				
GEOLSCI	210	GEOLOGIC EVOLUTION OF THE WESTERN U.S. CORDILLERA	3.00	3.00	A	
Instructor:		Miller, Elizabeth				
GEOLSCI	400	GRADUATE RESEARCH	6.00	6.00	S	
Instructor:		Miller, Elizabeth				

LAW TERM UNTS: 0.00 LAW CUM UNTS: 0.00

2018-2019 Spring

Course		Title	Attempted	Earned	Grade	Eqiv
GEOLSCI	400	GRADUATE RESEARCH	10.00	10.00	S	
Instructor:		Miller, Elizabeth				

LAW TERM UNTS: 0.00 LAW CUM UNTS: 0.00

2018-2019 Summer

Course		Title	Attempted	Earned	Grade	Eqiv
GEOLSCI	400	GRADUATE RESEARCH	10.00	10.00	S	
Instructor:		Miller, Elizabeth				

LAW TERM UNTS: 0.00 LAW CUM UNTS: 0.00

2019-2020 Autumn

Course		Title	Attempted	Earned	Grade	Eqiv
GEOLSCI	400	GRADUATE RESEARCH	10.00	10.00	S	
Instructor:		Miller, Elizabeth				

LAW TERM UNTS: 0.00 LAW CUM UNTS: 0.00

2019-2020 Winter

Course		Title	Attempted	Earned	Grade	Eqiv
GEOLSCI	801	TGR PROJECT	0.00	0.00	S	
Instructor:		Miller, Elizabeth				

LAW TERM UNTS: 0.00 LAW CUM UNTS: 0.00

2021-2022 Autumn

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	1013	CORPORATIONS	4.00	4.00	H	
Instructor:		Milhaupt, Curtis				
LAW	2505	LAND USE LAW	3.00	3.00	H	
Instructor:		Schwartz, Andrew W.				
LAW	4005	INTRODUCTION TO INTELLECTUAL PROPERTY	4.00	4.00	P	
Instructor:		Ouellette, Lisa Larrimore				

LAW TERM UNTS: 11.00 LAW CUM UNTS: 11.00

2021-2022 Winter

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	2402	EVIDENCE	5.00	5.00	P	
Instructor:		Fisher, George				
LAW	2519	WATER LAW	3.00	3.00	P	
Instructor:		Thompson Jr, Barton H				
LAW	4043	THE SOCIAL & ECONOMIC IMPACT OF ARTIFICIAL INTELLIGENCE	1.00	1.00	MP	
Instructor:		Kaplan, Samuel Jerrold				
LAW	7512	STATISTICAL INFERENCE IN LAW	3.00	3.00	MP	
Instructor:		Donohue, John J.				

LAW TERM UNTS: 12.00 LAW CUM UNTS: 23.00

2021-2022 Spring

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	1043	BLOCKCHAIN AND CRYPTOCURRENCIES: LAW, ECONOMICS, BUSINESS AND POLICY	4.00	4.00	MP	
Instructor:		Strnad, James Frank				
LAW	2503	ENERGY LAW	3.00	3.00	H	
Instructor:		Lindh, Frank R.				
LAW	2504	ENVIRONMENTAL LAW AND POLICY	3.00	3.00	H	
Instructor:		Owen, Dave R				
Transcript Note:		Gerald Gunther Prize for Outstanding Performance				
LAW	4010	INTELLECTUAL PROPERTY: PATENTS	3.00	3.00	H	
Instructor:		Ouellette, Lisa Larrimore				

Worksheet - For office use by authorized Stanford personnel Effective Autumn Quarter 2009-10, units earned in the Stanford Law School are quarter units. Units earned in the Stanford Law School prior to 2009-10 were semester units. Law Term and Law Cum totals are law course units earned Autumn Quarter 2009-10 and thereafter.

Leland Stanford Jr. University
School of Law
Stanford, CA 94305
USA

Law Unofficial Transcript

Name : Raftrey,Mark Edward
Student ID : 05718089

LAW TERM UNTS: 13.00 LAW CUM UNTS: 36.00

2022-2023 Autumn

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	908A	ENVIRONMENTAL LAW CLINIC: CLINICAL PRACTICE	4.00	4.00	P	
Instructor:		Safdi, Stephanie Lee Sanders, Matthew Jeffrey Sivas, Deborah Ann				
LAW	908B	ENVIRONMENTAL LAW CLINIC: CLINICAL METHODS	4.00	4.00	H	
Instructor:		Safdi, Stephanie Lee Sanders, Matthew Jeffrey Sivas, Deborah Ann				
Transcript Note:		Judge Thelton E. Henderson Prize for Outstanding Performance				
LAW	908C	ENVIRONMENTAL LAW CLINIC: CLINICAL COURSEWORK	4.00	4.00	P	
Instructor:		Safdi, Stephanie Lee Sanders, Matthew Jeffrey Sivas, Deborah Ann				

LAW TERM UNTS: 12.00 LAW CUM UNTS: 48.00

2022-2023 Winter

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	908	ADVANCED ENVIRONMENTAL LAW CLINIC	3.00	3.00	H	
Instructor:		Safdi, Stephanie Lee Sanders, Matthew Jeffrey Sivas, Deborah Ann				
LAW	2401	ADVANCED CIVIL PROCEDURE	3.00	3.00	P	
Instructor:		Zambrano, Diego Alberto				
LAW	2513	CLIMATE: POLITICS, FINANCE, AND INFRASTRUCTURE	3.00	3.00	P	
Instructor:		Gordon, Katherine H Seiger, Alicia Ann				
LAW	7001	ADMINISTRATIVE LAW	4.00	4.00	P	
Instructor:		Freeman Engstrom, David				

LAW TERM UNTS: 13.00 LAW CUM UNTS: 61.00

2022-2023 Spring

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	2403	FEDERAL COURTS	4.00	0.00		
Instructor:		Fisher, Jeffrey				
LAW	6003	THE AMERICAN LEGAL PROFESSION	3.00	0.00		
Instructor:		Gordon, Robert W				
LAW	7821	NEGOTIATION	3.00	0.00		
Instructor:		Schurz, James Mailliard				

LAW TERM UNTS: 0.00 LAW CUM UNTS: 61.00

END OF TRANSCRIPT

Worksheet - For office use by authorized Stanford personnel Effective Autumn Quarter 2009-10, units earned in the Stanford Law School are quarter units. Units earned in the Stanford Law School prior to 2009-10 were semester units. Law Term and Law Cum totals are law course units earned Autumn Quarter 2009-10 and thereafter.

June 18, 2023

The Honorable P. Casey Pitts
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

Dear Judge Pitts:

I write, with great enthusiasm, to recommend Mark Raftrey for a clerkship in your chambers. Mark is a superb student and writer and a meticulous researcher, and he will be an excellent clerk.

I have come to know Mark through two sets of interactions. First, he was one of the students in my environmental law class, which I taught at Stanford last spring. Second, he was the senior articles editor assigned to an article I recently published with the Stanford Law Review. Consequently, I have learned more about his research work and attention to detail than a professor typically learns about one of his students.

In class, Mark was excellent. He received the highest overall score for the class (out of about thirty students), and his final exam, which spanned a range of difficult questions, showed clear and creative thinking and careful writing. Based on that test alone, I expect he will excel as a clerk.

He also was a valued participant in class discussions. Here, Mark picks his spots; his natural inclination is to listen, carefully, rather than to take over a conversation. For that reason, his hand was rarely the first to go up, and he instead would often wait until a question had stumped his fellow students before raising his hand. I expect he would be the same way in a workplace setting; he has none of the glib intellectual flashiness that top law students often display, and he will make space much more often than he takes it. But when he spoke, it was always clear that he had been thinking carefully about the subject matter and that he had valuable insights to offer. Additionally, and importantly, he was always respectful and kind in his interactions with classmates and with me. I would happily bring him into any professional team of which I was part.

In his editorial work, Mark was meticulous. He and his fellow editors went through round after round of work on footnotes and phrasing, taking an article that I had thought was well-written and turning it into something much tighter and more thoroughly documented (they later told me it had been one of their easier articles to work on; I can only imagine how much work they must have put into the difficult ones). At this point in my career, I've worked with many student editorial teams and have almost always been pleased with their work, but Mark's team's efforts were on another level. So much of being a judicial clerk is getting the details correct, and I am certain, based on seeing months of his work, that Mark's attention to detail and endurance for grinding work are areas of strength.

One last detail about Mark merits some emphasis. Prior to and during law school, he has found his way to positions of leadership, even in situations when a leadership role might seem unlikely.

Most notably, for a transfer student to become a Stanford Law Review articles editor in his first year at the school speaks volumes about his ability to earn the respect of his fellow students. While I do not know exactly how he came into this role, I strongly suspect it was through the quality of his work and through his attentiveness to his peers.

In summary, I highly recommend Mark for a clerkship. Please do not hesitate to contact me if you have any questions about his candidacy.

Sincerely,

Dave Owen

StanfordLawSchool

JENNY S. MARTINEZ
Richard E. Lang Professor of Law and Dean

Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610
Tel 650 723-4455
Fax 650 723-4669
jmartinez@law.stanford.edu

Stanford Grading System

Dear Judge:

Since 2008, Stanford Law School has followed the non-numerical grading system set forth below. The system establishes "Pass" (P) as the default grade for typically strong work in which the student has mastered the subject, and "Honors" (H) as the grade for exceptional work. As explained further below, H grades were limited by a strict curve.

H	Honors	Exceptional work, significantly superior to the average performance at the school.
P	Pass	Representing successful mastery of the course material.
MP	Mandatory Pass	Representing P or better work. (No Honors grades are available for Mandatory P classes.)
MPH	Mandatory Pass - Public Health Emergency*	Representing P or better work. (No Honors grades are available for Mandatory P classes.)
R	Restricted Credit	Representing work that is unsatisfactory.
F	Fail	Representing work that does not show minimally adequate mastery of the material.
L	Pass	Student has passed the class. Exact grade yet to be reported.
I	Incomplete	
N	Continuing Course	
[blank]		Grading deadline has not yet passed. Grade has yet to be reported.
GNR	Grade Not Reported	Grading deadline has passed. Grade has yet to be reported.

In addition to Hs and Ps, we also award a limited number of class prizes to recognize truly extraordinary performance. These prizes are rare: No more than one prize can be awarded for every 15 students enrolled in a course. Outside of first-year required courses, awarding these prizes is at the discretion of the instructor.

* The coronavirus outbreak caused substantial disruptions to academic life beginning in mid-March 2020, during the Winter Quarter exam period. Due to these circumstances, SLS used a Mandatory Pass-Public Health Emergency/Restricted Credit/Fail grading scale for all exam classes held during Winter 2020 and all classes held during Spring 2020.

For non-exam classes held during Winter Quarter (e.g., policy practicums, clinics, and paper classes), students could elect to receive grades on the normal H/P/Restricted Credit/Fail scale or the Mandatory Pass-Public Health Emergency/Restricted Credit/Fail scale.

The five prizes, which will be noted on student transcripts, are:

- the Gerald Gunther Prize for first-year legal research and writing,
- the Gerald Gunther Prize for exam classes,
- the John Hart Ely Prize for paper classes,
- the Hilmer Oehlmann, Jr. Award for Federal Litigation or Federal Litigation in a Global Context, and
- the Judge Thelton E. Henderson Prize for clinical courses.

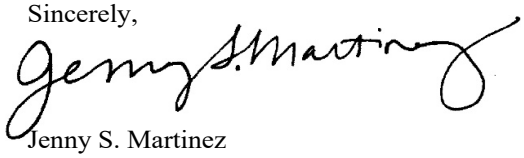
Unlike some of our peer schools, Stanford strictly limits the percentage of Hs that professors may award. Given these strict caps, in many years, *no student* graduates with all Hs, while only one or two students, at most, will compile an all-H record throughout just the first year of study. Furthermore, only 10 percent of students will compile a record of three-quarters Hs; compiling such a record, therefore, puts a student firmly within the top 10 percent of his or her law school class.

Some schools that have similar H/P grading systems do not impose limits on the number of Hs that can be awarded. At such schools, it is not uncommon for over 70 or 80 percent of a class to receive Hs, and many students graduate with all-H transcripts. This is not the case at Stanford Law. Accordingly, if you use grades as part of your hiring criteria, we strongly urge you to set standards specifically for Stanford Law School students.

If you have questions or would like further information about our grading system, please contact Professor Michelle Anderson, Chair of the Clerkship Committee, at (650) 498-1149 or manderson@law.stanford.edu. We appreciate your interest in our students, and we are eager to help you in any way we can.

Thank you for your consideration.

Sincerely,



Jenny S. Martinez
Richard E. Lang Professor of Law and Dean

Updated May 2020

Lisa Larrimore Ouellette
Deane F. Johnson Professor of Law
Senior Fellow, Stanford Institute for Economic Policy Research (SIEPR)
Stanford Law School
Crown Quadrangle
559 Nathan Abbott Way
Stanford, California 94305-8610
ouellette@law.stanford.edu
650 721.2928

June 18, 2023

The Honorable P. Casey Pitts
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

Dear Judge Pitts:

I am writing to highly recommend Mark Raftrey for a judicial clerkship. Mark is a talented Stanford Law student with a particular interest in environmental law and policy, and he has juggled his academic successes with the extensive time commitment of serving as an Articles Editor for the Stanford Law Review. As a student in my Intellectual Property and Patent Law classes during his 2L year, Mark consistently demonstrated his intelligence, diligence, intellectual curiosity, and enthusiasm. I was particularly impressed with his decision to enroll in Patent Law after finding the patent-related material to be the most challenging part of Intellectual Property. He emerged as one of the top students in my competitive Patent Law class, outperforming many students who had prior patent experience or who had already secured federal clerkships. I am confident that Mark will excel in the work of a law clerk.

Mark transferred to Stanford as a 2L after an outstanding 1L year at UC Davis Law School because he wanted to further challenge himself academically and take advantage of our clinical programs. I had the opportunity to teach him in one of his first Stanford classes, my fall 2021 Intellectual Property class, as he was still getting his footing among his new classmates. IP is a challenging class, with extensive readings covering five areas of IP— trade secrets, utility patents, design patents, copyrights, and trademarks. Students not only must be prepared for when I call on them to discuss the readings, but also must complete multiple-choice review quizzes during class and online assignments to acquaint them with practical aspects of searching for different forms of IP. Mark was always ready to engage at a high level when I called on him, and he stopped by my office hours to probe the contours of the doctrine we covered. He was also one of the top performers in the class on the copyright law multiple-choice review quiz.

I tested my IP students with a blind-graded, eight-hour exam with two complex issue-spotters covering every area of IP we had covered. Mark's response was quite strong—he demonstrated a very solid understanding of the doctrinal material as well as excellent judgment about which issues to spend time on. He earned top scores in every section except utility patents, where he missed some points in his application of the novelty statute under 35 U.S.C. § 102. I was sorry that our rigid grading curve placed him just below the Honors/Pass cutoff. Unlike other top law schools with facially similar grading systems, Stanford Law School uses a strict curve, with an inflexible cap on the percentage of students who can receive an Honors grade. If had been allowed to award just a few more Honors grades, one would have gone to Mark.

I was delighted that Mark was not discouraged from enrolling in another class with me—I had the opportunity to teach him again in my spring 2022 Patent Law class. Patent Law builds on the patent-related material covered in my Intellectual Property class, allowing us to dive deeper into the weeds of the doctrine, and the smaller class size gave me a better chance to get to know each student individually. It was also an extremely impressive group of students. Most of the other students in the class were patent specialists with prior patent-related experience or technical degrees. Out of the twenty-two 2L and 3L JD students in the class, twelve (more than half!) have already secured federal clerkships, and seven will be clerking on two different federal courts.

Even with the very high level of performance in the class, Mark more than held his own. He pushed himself to volunteer frequently and to come to office hours even more regularly, and his insightful contributions to class discussions reflected the amount of time he put into the class. He collaborated well with classmates on small-group activities. He was also one of a handful of students who came to a practice-focused patent law conference that Stanford hosted in April 2022, despite his lack of patent background. I also asked students to complete an obviousness claim chart exercise based on a real patent and real prior art, and Mark's written work product could have passed for that of a more experienced law firm associate.

On the challenging blind-graded exam, Mark easily earned his Honors grade. His writing was clear, organized, and thoughtful, and he demonstrated a real mastery of the patent law material. He outperformed many of his peers who have already secured clerkships, including two who will be clerking for highly selective judges on the Ninth Circuit. And I see from his transcript that he also excelled in his other classes that quarter, earning Honors in all his graded classes and a class prize in his Environmental Law and Policy class.

Finally, it is worth noting that Mark is a pleasure to spend time with. He is polite and unassuming, but also curious about a wide range of issues. Our discussions during office hours covered far more than patent doctrines—I enjoyed hearing about his

environmental law work, and he was curious about the non-patent-focused research projects I'm working on. He is the first in his family to attend law school, and he speaks eloquently about how he was motivated to pursue a legal career during his M.S. program in Geological Sciences after seeing how law could intersect with science to create positive changes for society. I think he would be a delight to have in chambers.

Please do not hesitate to be in touch if you have further questions; I am available by email at ouellette@law.stanford.edu or on my cell phone at 610-715-7705.

Sincerely,

/s/ Lisa Larrimore Ouellette

Stephanie Safdi
Clinical Supervising Attorney
Lecturer in Law
559 Nathan Abbott Way
Stanford, California 94305-8610
650-497-9443
ssafdi@stanford.edu

June 18, 2023

The Honorable P. Casey Pitts
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

Dear Judge Pitts:

I write to highly recommend Mark Raftrey for a clerkship in your chambers. I am a supervising attorney and lecturer in Stanford's Environmental Law Clinic, where I have had the pleasure of directly overseeing Mark's work as a full-time clinical student during the Fall 2022 quarter and as an advanced clinical student during the Winter 2023 quarter. Both quarters have tasked Mark with representing a unique coalition of client organizations in advancing challenging and novel arguments through a variety of administrative venues. Mark has excelled at every turn. Mark is among the strongest as well as among the most committed, hard-working, and mature students I have taught during my two years at Stanford. He would be a tremendous asset to any judicial chambers.

A brief description of our Clinic: Like other clinics within Stanford's Mills Legal Clinic program, the Environmental Law Clinic provides pro bono assistance to non-profit organizations and occasionally to governmental entities. Students generally work in teams of two or three and, with close supervision from their supervising attorney, take the reins in the representation. During their full-time quarters, our students devote their academic schedules exclusively to our Clinic, spending their time principally on case work but also in seminar learning substantive law and lawyering skills and engaging across student teams in case rounds and workshops. The Environmental Law Clinic differs from many of Stanford's other legal clinics in that we focus on technically and legally complex matters that require sustained engagement and subject-matter expertise, as well as deployment of a variety of legal skills. Our clients are almost always organizations interested in the public policy aspects of a particular problem or dispute. In our approximately ten-week academic term, such representations can be extremely challenging for students, who have only a short window to learn the law, master the facts, and develop relationships with clients before they must dive into analytic and persuasive writing. As a consequence, work in our Clinic can be uniquely demanding, and we are highly selective in our clinical admissions.

Mark's work the past two quarters has primarily been on a single but uniquely challenging matter – representing a diverse coalition of Northern California tribes and community-based organizations in and around Stockton in efforts to strengthen water quality standards governing the degraded Bay-Delta watershed. The Bay-Delta watershed is the largest on the Pacific Coast of the Americas but has been driven by large-scale export of water into a widely acknowledged state of ecological crisis. When Mark joined the Clinic, the State Water Resources Control Board has recently rejected a Petition for Rulemaking that we filed on behalf of our client coalition asking the Board to update water quality standards governing instream flow levels in the Bay-Delta. Mark and his clinic partner were tasked with quickly coming up to speed on the legally and scientifically technical subject matter, developing trust and rapport with our diverse client coalition, guiding the coalition through selection of our next strategic steps, and then executing on those steps – all within the space of an 11-week quarter. Not a small task!

Mark exceeded expectations on every aspect of the work. First on the interpersonal, this representation is extremely client-centered and demands a high level of cultural competency. Among other aspects of client work, Mark and his clinic partner were tasked with taking over leadership of biweekly coalition meetings with the client coalition, as well as communication with individual client representatives to guide them through complicated strategic decisions and elicit and manage feedback on work product. Given his background in the physical sciences and quiet temperament, it was not obvious to me that Mark would take to this work. I was wrong. Over the course of the quarter, I watched Mark develop increasing confidence, voice, and agency in these client interactions – workshopping communication strategies with me and his clinic partner, taking the reins on delicate client conversations, and clearly and respectfully distilling complicated and technical legal subjects for our clients to enable them to be effective and engaged partners in decision-making. Mark carried this same courage and clarity through his coleadership of multiple conversations with high-level state and federal agency administrators throughout the course of the quarter to advocate for our clients' positions. Although the interpersonal aspect of the work may have stretched him, Mark never shied from it and showed warmth, empathy, and sophistication in these engagements. It has been a delight to see Mark grow and develop confidence and skill in this area.

Second, the representation has demanded challenging strategic decision-making at multiple turns – from selection of advocacy vehicles, to decisions about what legal and factual elements to center, to assisting clients in navigating myriad related considerations that have arisen in the course of the representation. Mark has been an excellent thought-partner and guide for the clients in navigating these inflection points. He always comes into conversations prepared and organized, he does not shy away from complexities, and he has a keen eye for teasing out considerations to guide strategic decisions. I have also particularly appreciated and admired Mark's courage in pushing back against or raising questions with my own instincts when he has a

different view – this willingness to raise questions and assert his own voice and perspectives, informed by his research, would be an excellent asset to chambers.

And finally, Mark's written work product is very strong. As with almost all our law students, Mark came into his first clinical quarter without prior experience taking the lead on drafting an actual filing. Mark also had the additional challenge of drafting a novel filing – a combined Petition for Rulemaking and administrative complaint under Title VI of the Civil Rights Act. This was accompanied by declarations by affected community members that Mark helped create through structured interviews and draft exchange. The work demanded careful research, precision in drafting, active listening, and strong storytelling. Mark was tenacious in producing draft after draft in response to my and the clients' feedback to hone the work, and his writing improved wonderfully in structure, clarity, and precision over the course of the quarter. He was also generous in quietly and without seeking recognition picking up sections from his clinic partner when the partner's other assignments interfered. In addition, alongside his primary assignment, Mark was tasked with several smaller secondary assignments, including drafting a proposed judgment and writ in a separate litigation matter. Mark executed on this work quickly and well, and I appreciated his willingness to stretch himself to jump in on other projects even when his primary matter was consuming. Mark's strong written work during the quarter earned him a book prize.

Based on his strong contributions in the fall quarter, we invited Mark to return to take the lead on continuing to represent the client coalition this winter. It has been a pleasure watching Mark use the trust he built with the clients, his subject matter knowledge, and his muscle memory for legal writing developed last quarter to lead this representation for the Clinic this winter, under my increasingly light-touch supervision. Since the quarter started in mid-January, Mark has submitted a comment letter to a state agency on a technical scientific basis report, provided oral comment at public hearing before the agency, coordinated and led a challenging call with federal administrators on the Title VI complaint, conducted a media interview, and guided the coalition through several challenging strategic junctures. He is also in the process of drafting a comment to the U.S. Environmental Protection Agency for the client coalition on a related technical subject. For this comment, I asked a more junior first-time clinic student to join the team to assist with drafting, largely to give Mark the opportunity to work in a peer mentoring position and for this other student to benefit from Mark's guidance. Mark has been a generous and thoughtful partner for this student, and it has been a joy to see him flourish in this quasisupervisorial role. Meanwhile, Mark has met and even exceeded the deadlines we have set for his work, which is exceptional given that Mark has had to juggle this extensive client work alongside his academic and other commitments.

On a personal note, Mark is a pleasure to work with. He is positive, tenacious, thoughtful, and always ready for a challenge. Even when under heavy deadline pressure or facing significant stakes, Mark keeps calm, digs in, and delivers. He accepts feedback and critique with grace and couples a quiet maturity with a willingness to stretch himself and a readiness to collaborate and be part of a team. These qualities would again serve him excellently in a collaborative chambers environment.

Please do not hesitate to contact me if I can be of any further assistance concerning Mark's application.

Sincerely,
/s/ Stephanie Safdi

Stephanie Safdi - ssafdi@stanford.edu - (650) 497-9443

MARK RAFTREY

225 Manzanita Ave., Palo Alto, CA 94306 | (650)-759-3541 | mraftrey@stanford.edu

WRITING SAMPLE

The attached writing sample is a Statement of Decision that I helped draft for Judge Nancy Fineman while externing for the Superior Court of the County of San Mateo. Judge Fineman gave me permission to use this as a writing sample, and the document is publicly available. I sat in on the trial of this case, and independently drafted Part V of the Statement of Decision with Judge Fineman's guidance and feedback. I left the other Parts intact for context.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

LOUIS PAYCHECK, Plaintiff, v. PUNIT K. SARNA, *et al.* Defendants. AND RELATED CROSS-ACTION.	Case No. 19Civ02595 **STATEMENT OF DECISION** Trial Date: May 12, 2021 Dept.: 4 Honorable Nancy L. Fineman

STATEMENT OF DECISION

On June 7, 2021, this Court issued its Tentative Decision and Proposed Statement of Decision pursuant to California Rule of Court 3.1590(c). On June 10, 2021, pursuant to the stipulation of the parties, the Court entered an order regarding Trial Dates/ Procedure Order regarding the time for objections to the Court's decision.

On June 16, 2021, defendants Punit K. Sarna and Puja Sarna ("Sarnas") filed a Declaration of Matthew A. Haulk in Support of Post-trial Supplemental Brief and Non-Objection to Proposed Statement of Decision. On June 18, 2021, Plaintiff Louis Paycheck dba European Enterprises ("Paycheck") filed Objections to Proposed Statement of Decision and on June 21, 2021 filed an Amendment to Plaintiff's Objections to Proposed Statement of Decision. On June 21, 2021, the Sarnas filed an Amendment to Non-Objection to Proposed Statement of Decision with an accompanying Request for Judicial Notice. No party requested oral argument on the objections.

The Court has reviewed the pleadings filed after it issued its Tentative Decision and considered the argument raised therein, grants Sarnas' Request for Judicial Notice, concurs that oral argument is not needed (see California Rule of Court 3.1590(k)), and therefore, issues this Statement of Decision.

I. INTRODUCTION

This case involves a dispute between a contractor, plaintiff Paycheck, and property owners who hired him to renovate an apartment building, defendants Punit K. Sarna ("Sarna") and Puja Sarna (collectively "Sarnas"). By agreement of the parties, the Court bifurcated the legal issue of the application of Business & Professions Code section 7031 ("the licensing trial") from the jury trial regarding the construction issues.

II. PROCEDURAL BACKGROUND

A. Operative Pleadings

On May 10, 2019, Paycheck filed his complaint seeking monies for unpaid compensation. With their answer filed on July 11, 2019, the Sarnas filed a cross-complaint alleging Paycheck violated numerous provisions of the California Contractors License Law and, as a result, must

disgorge all compensation received. On October 9, 2019, the Sarnas filed their First Amended Cross-Complaint.

By agreement of the parties, the Court tried Sarna's Sixth Cause of Action based on Business and Professions Code section 7031(b), Sarna's defense to the Complaint based upon Business and Professions Code section 7031(a), and Paycheck's "substantial compliance hearing" under Business and Professions Code section 7031(e).

B. Trial

The bifurcated issues were tried to the Court with evidence presented on May 12, 2021 and closing argument on May 26, 2021. Richard M. Kelly of Kelly Litigation Group, Inc. represented Paycheck. Matthew A. Haulk of Ragghianti Freitas LLP represented the Sarnas.

At trial Sarna, Paycheck, and third-party witness Shannon Sines ("Sines"), owner of SSS Fire Protection of Los Gatos, CA ("SSS Fire") testified.

C. Joint Request for Statement of Decision

The parties jointly presented the following as the principal controverted issues:

1. Was LOUIS PAYCHECK dba EUROPEAN ENTERPRISES a duly licensed contractor at all times during the performance of that act or contract at 721 Rollins Road, Burlingame, CA, which is the subject matter of this action, pursuant to Business and Professions Code sections 7031(a) and (b)?
   If the court's analysis is "yes", no further analysis is required by the court. If the court's analysis is "no", proceed to Issue no. 2.

2. Was LOUIS PAYCHECK dba EUROPEAN ENTERPRISES in substantial compliance with licensure requirements pursuant to Business and Professions Code section 7031(e)?

   If the court's analysis is "yes", no further analysis is required by the court. If the court's analysis is "no", proceed to Issue no.'s 3 and 4.

3. Is Plaintiff LOUIS PAYCHECK dba EUROPEAN ENTERPRISES's Complaint, and all causes of action therein, against Defendants PUNIT K. SARNA and PUJA SARNA barred by Business and Professions Code section 7031(a)? and,

///
///

4. Is Cross Complainant, PUNIT K. SARNA, to recover all compensation paid to the unlicensed contractor, LOUIS PAYCHECK dba EUROPEAN ENTERPRISES, for the performance of any act or contract at 721 Rollins Road, Burlingame, CA pursuant to Business and Professions Code section 7031(b)? If yes, what is the amount the court awards.

Joint Request for C.R.C. 3.1950 Statement of Decision filed May 28, 2021.

III. STANDARD OF PROOF

The parties agree that Paycheck, whose license was challenged, must provide clear and convincing evidence that he was "duly licensed in the proper classification of contractors at all times" during performance of the work. Bus. & Prof. Code § 7031(d); *Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 393. Clear and convincing means that the party must persuade the trier of fact "that it is highly probable that the fact is true." CACI 201.

The trial court in issuing a Statement of Decision "is required only to state the ultimate rather than the evidentiary facts. The statement of decision need do no more than state the grounds upon which the judgment rests, without necessarily specifying the particular evidence considered by the trial court in reaching its decision." *In re Marriage of Williamson* (2014) 226 Cal.App.4th 1303, 1318-19 (citations and internal quotations omitted); see also *Richardson v. Franc* (2015) 233 Cal.App.4th 744, 753, n.2 (trial court was not required to make "specific factual findings" on every evidentiary point; rather the Statement of Decision need only state grounds for the judgment, without necessarily specifying the particular evidence considered by the trial court in reaching its decision).

IV. FACTUAL BACKGROUND

The findings of fact in this Statement of Decision are based upon all the evidence both oral and documentary, including the credibility of the witnesses. The Court has not identified all the facts supporting this Decision, but only the ones the Court finds the most material. *Husain v. California Pacific Bank* (2021) 61 Cal.App.5th 717, 732.

///

///

A. The Parties

1. Paycheck

Paycheck,[1] who is 78 years old, has two undergraduate degrees, has been a general contractor for the last 30 years, and is the owner of European Enterprises, a sole proprietorship. The following facts about Paycheck's licensure are undisputed: First, Paycheck, through European Enterprises, had a general contractor's license issued by the California Contactors State Licensing Board ("CSLB") during all relevant times. Ex. 9. Second, Paycheck's license was never explicitly suspended or revoked at any time between January 1, 2017 and the present. Third, Paycheck does not have the C-16 specialty license to install fire protection sprinklers.

2. The Sarnas

Sarna is a doctor. He and his sister, Puja Sarna, own a five-unit residential building located at 721 Rollins Road, Burlingame, California (the "property").

B. The Agreement Between the Parties

Prior to meeting Paycheck, Sarna interviewed three other contractors. Sarna testified that he asked Paycheck about his employees and that Paycheck responded that he had 14 employees.

There was not a signed written agreement between the parties, but both parties agree that an unsigned agreement dated November 12, 2017, Ex. 1, memorialized their agreement. The parties agree that the agreement called for Paycheck to demolish and remodel the apartment building owned by the Sarnas. In the agreement, Paycheck represented that he had workers' compensation insurance. Ex. 1, p. 2. That representation was false because he did not have workers' compensation insurance at that time. Ex. 9. Sarna testified that he would not have hired Paycheck if he knew that Paycheck did not have workers' compensation insurance.

C. The Demolition

The parties agree that Paycheck was responsible for the demolition at the property and that he used other workers for the demolition, but they disagree on the date that the demolition began.

---

[1] Paycheck testified that he was convicted in 1972 for conspiracy to commit air piracy and that he served 13 years in prison. Thereafter, he changed his name to Paycheck. These facts were not considered by the Court in its analysis or conclusion.

Paycheck testified at trial that the demolition did not start until December, 2017. Sarna, on the other hand, testified that the demolition started in mid-November, 2017. Sarna's recollection is supported by Paycheck's discovery responses and deposition testimony in which he stated that the work, including the demolition specifically, started in mid-November, 2017. Exs. 28, 30; deposition transcript at 22:12-29:9.

D. The Renovation of the Apartment Building

Paycheck supervised the renovation of the apartment building with others performing the work. The work included plumbing, electrical, demolition, and stucco. Ex. 28; Paycheck testimony. Paycheck stopped work in December 2018 after he and Sarna had a disagreement over the remaining work and outstanding payments.[2]

E. The Sprinkler System

The parties agree that Paycheck did not have the specific license, a C-16 Fire Protection License, required to install fire protection sprinklers and that Paycheck would be hiring someone else to install them.

Paycheck hired Jose Carbohol ("Carbohol") who represented that he was working on behalf of SSS Fire to install the sprinklers. Paycheck had met Carbohol at The Home Depot and Carbohol was driving an SSS Fire truck. Paycheck had used Carbohol to install sprinklers on other projects without incident.

The initial November 12, 2017 agreement included installation of a fire sprinkler system. Ex. 1. Paycheck testified that Sarna thought that the cost was too high and that he told Sarna to deal directly with Carbohol. Paycheck also testified that the sprinkler work was not part of the agreement, but that testimony is contradicted by Paycheck's invoice of July 14, 2018, Ex. 2, which on page 2 provides: "3. Create drawings and install sprinklers…$10,300.00" and the invoice of September 16, 2018, Ex. 3, which on page 1 provides: "3. Fire sprinklers additional Valve purchase and Installation…$2,700.00." That testimony is also contrary to Paycheck's

---

[2] Sarna testified about the emotional distress that the last meeting caused, especially because he was expecting a baby within a short period of time. These facts were not considered by the Court in its analysis or conclusion.

interrogatory response regarding the scope of his work, which included "plumbing for fire sprinklers . . . ." Ex. 28 (response to Interrogatory No. 321.2). While Paycheck testified at trial that he was not seeking reimbursement for the sprinkler installment, his Complaint at paragraph 9 states that the amount owed was $236,900.70, matching the amount represented in the agreement and change order. Exs. 2, 3, 39; see also Exs. 32, 33 (response to request for admission No. 7).

Sines, the owner of SSS Fire, testified that Carbohol was a rogue employee who entered into numerous agreements to install sprinklers without Sines' knowledge. Sines let it go because Carbohol reimbursed the company for those projects. Sines later fired Carbohol. Although the testimony was somewhat unclear, the Court concludes that Carbohol was working for SSS Fire at the time the sprinkler installation work was performed at the property. Sines testified that SSS Fire never had a contract to perform any work at the property and that Exhibit 36, the agreement, was forged. He testified that when he received a call to perform the final inspection he did not know about the project, but went to the property nonetheless to assist in obtaining the final sign-off by the Burlingame Fire Department.

Sines also testified that he heard that Carbohol explained away Sines' initial absence from the project by telling others that Sines was dying of COVID-19. Sarna's counsel correctly pointed out in closing argument that COVID-19 was not known in the United States until early 2020, and therefore the statement could not be true. However, Sarna never questioned Sines about this discrepancy to allow him to explain it. In weighing the evidence and the credibility of the witnesses, the Court finds Sines was a credible witness with specific testimony consistent with the facts of this case, including the property location and Paycheck's name.

F. Workers' Compensation Insurance

Paycheck testified that, when needed, he obtained appropriate workers' compensation insurance or acted promptly and in good faith to obtain it. Sarna disagrees.

On June 21, 2017, Paycheck applied for an exemption from the workers' compensation insurance requirement. Ex. 14. In that application, Paycheck represented that "I do not employ anyone in the manner subject to the workers' compensation laws of California" and "I also understand that, as soon as I employ anyone subject to the California's workers' compensation laws,

I must obtain a Certificate of Workers' Compensation Insurance . . . ." *Id.* The exemption was granted on June 26, 2017. Ex. 9.

In late November after entering into the agreement for this project, Paycheck submitted a workers' compensation insurance application, in which he represented that he had a total annual payroll of $30,000 for carpentry work. Ex. 15. On November 29, 2017, a broker issued a proposal of insurance. *Id.* On December 1, 2017, Paycheck was issued a one-year policy. Ex. 16. The policy was then cancelled on February 28, 2018 due to non-payment of premiums, Ex. 17, but renewed on the same day with a different policy number through December 1, 2018. Paycheck testimony; Exs. 19, 20. In the second application, Paycheck represented that he had an annual payroll of $22,685. Ex. 19. In a premium audit covering the period December 1, 2017 through February 28, 2018, Paycheck represented that he had income of $3,782.15 and that his employee Victor Castro was paid $1,281.17 in cash as a cabinet installer. Ex. 18. Paycheck testified that Castro was not an employee, but that in order to obtain workers' compensation insurance, he needed to show a minimal amount of payroll. On December 1, 2018, the insurance carrier did not renew the insurance due to failure to meet the minimum payroll requirement. Ex. 21.

Since Paycheck's exemption was in effect until he acquired workers' compensation insurance on December 1, 2017, it is undisputed that for this period from November 12-30, 2017, he did not have workers' compensation insurance.

G. Employees/Independent Contractors

The parties dispute whether the people who worked for Paycheck were employees or independent contractors.

Paycheck testified at trial that he only used independent contractors rather than employees on the Sarna project, and that he only obtained workers' compensation insurance to make sure that the workers were protected.

Sarna introduced contrary evidence. During his deposition, Paycheck testified that Edgar Giovani Orrego, Victor Castro and "other guys" who performed the demolition were his employees. Deposition transcript 46:7-48:4. He also testified that he did not hire subcontractors. Deposition transcript 58:17-59:16. In discovery responses, Paycheck also referred to these workers

as employees. Exs. 29, 30 (answer to Interrogatory Nos. 23, 24), 31 (amended response to Interrogatory No. 17). At trial, Paycheck testified that these testimony and discovery responses were incorrect.

Paycheck also confirmed during cross-examination that he made payments to various workers. Exs. 5, 6, 7, 8. Specifically, the documents demonstrate that in 2018, Paycheck paid Castro $143,749 (Ex. 8, p. 192) and paid Orrego $332,695 (Ex. 8, p. 196). During the workers' compensation insurance premium audit period of December 1, 2017 to February 28, 2018, Paycheck paid Orrego $5,000 on December 8, and $34,880 total. Ex. 6.

V. ANALYSIS

A contractor is not entitled to any compensation under a private contract unless that contractor is duly licensed at all times during the performance of the work. 9 Miller & Starr, *California Real Estate* § 31:9 (4th ed. 2020) ("Miller & Starr"). To be duly licensed, a contractor must carry workers' compensation insurance, or have a valid exemption. Lab. Code § 3700; Bus. & Prof. Code § 7125. Those who fail to meet one of these requirements may assert a defense of substantial compliance with the licensure requirements. Bus. & Prof. Code § 7301(e).

The harsh noncompliance penalty imposed by the licensure requirement reflects the legislative intent to deter unlicensed contractors from offering their services, and thus protect the public from the "incompetence and dishonesty" of those parties. *Hydrotech v. Oasis* (1991) 52 Cal.3d 988, 995. The *Hydrotech* court further explained that "[b]ecause of the strength and clarity of this policy, it is well settled that section 7031 applies despite injustice to the unlicensed contractor" and "that the importance of deterring unlicensed persons from engaging in the contracting business *outweighs any harshness between the parties* . . . ." *Id.* (emphasis in original).

After considering the evidence presented, including the credibility of the witnesses, the Court finds that Paycheck was not a duly licensed contractor at the time he performed work for Sarna, and that he failed to establish the substantial compliance defense set forth in Business and Professions Code section 7031(e).

///

A. Licensure throughout the Project

i. Legal Standard

To be duly licensed, a contractor employing other workers must have a current and valid Certificate of Workers' Compensation Insurance at all times. 9 Miller & Starr § 31:9; Bus. & Prof. Code § 7125. There is a rebuttable presumption that anyone working for a contractor is an employee and not an independent contractor, thus subjecting the employer to the insurance requirement. Lab. Code § 2750.5. However, a contractor not employing others may obtain an "exemption" if that person files a statement to that effect with the CSLB. Bus. & Prof. Code § 7125.

Failure to obtain or maintain workers' compensation insurance when required, or to obtain an exemption, results in the automatic suspension of a contractor's license. *Id.*; *see also Wright v. Issak* (2007) 149 Cal.App.4th 1116. If a contractor fails to obtain (as opposed to maintain) insurance, his license is suspended effective the day that the coverage should have been obtained. Bus. & Prof. Code § 7125.2. Such a suspension does not require prior notice before taking effect because the CSLB has no way of knowing when a contractor fails to obtain insurance (as opposed to when a contractor fails to maintain a policy already in its system). *See Wright*, 149 Cal.App.4th 1116, 1122 n.2. A contractor who continues to work after a license suspension acts as an unlicensed contractor, may not recover for work performed on a project, and must disgorge all monies received for that work. Bus. & Prof. Code § 7031(b).

Here, Sarna does not argue that Paycheck had no contractor's license during the project, but rather that his license was only facially valid because it was automatically suspended when he hired employees and began work on the Sarna project in November 2017 without workers' compensation insurance. Sarna also claims that Paycheck's workers' compensation insurance policy that he obtained after he started work on the project was invalid because he grossly understated his payroll in his application.

On the other hand, Paycheck maintains that he held either a valid workers' compensation policy or exemption at all times during the project, and that his license was never actually suspended by the CSLB. He also claims that he substantially complied with the licensure requirements by satisfying the elements outlined in Business and Professions Code section 7031(e).

ii. Relevant Case Law

The parties largely agree on which cases are relevant to the present dispute, but they disagree on their applicability to this case. The cases are described below, along with the parties' respective interpretations and points of contention.

(a) *Judicial Council of California v. Jacobs Facilities*

Sarna analogizes *Jacobs Facilities* to argue that even a short period of non-licensure may render a contractor's license suspended, resulting in disgorgement. In *Jacobs Facilities*, the defendant was licensed at the time it entered a maintenance and repair contract with the plaintiff. *Judicial Council of California v. Jacobs Facilities, Inc.* (2015) 239 Cal.App.4th 882, 889-90. Due to a mix-up during a corporate reorganization, the defendant's license expired during the contract period. *Id.* at 903. The court found that "[b]ecause [Jacobs] Facilities was unlicensed for a portion of the period of its contract performance, its compensation under the contract is subject to forfeiture under subdivisions (a) and (b) of section 7031." *Id.* at 897. While acknowledging the harshness of the rule, the court reversed the jury's "attempt to reach an equitable solution" because "that is the remedy the Legislature has prescribed." *Id.* at 910.

(b) *Wright v. Issak*

In *Wright*, the court found that the plaintiff was not a licensed contractor because his license was automatically suspended for failing to obtain and maintain workers' compensation insurance despite employing a team of three to five workers. *Wright*, 149 Cal.App.4th at 1119. The contractor had grossly understated his payroll to the policy provider in his initial application. *Id.* In subsequent reports, the contractor stated a payroll of zero or nearly zero for the period of time he worked on the defendant's house and the two years prior. *Id.* This included one period where he reported a payroll of $312 while having an actual payroll of $135,000. *Id.* The court found that this amounted to failure to obtain workers' compensation insurance, and that his license was automatically suspended the day he should have obtained such insurance. *Id.* at 1121.

Sarna argues that Paycheck similarly misrepresented his payroll in obtaining an insurance policy, and therefore had his license automatically suspended by operation of law. Paycheck distinguishes *Wright* by claiming that in that case, the contractor never had a policy of workers'

compensation insurance and intentionally underreported the wages he was paying to avoid the requirement altogether.

(c) *Loranger v. Jones*

In *Loranger*, a contractor hired an unlicensed subcontractor and two minor workers who did not have work permits. *Loranger*, 184 Cal.App.4th at 851. The defendants (then cross-complainants) claimed that these facts showed that the contractor necessarily had not reported his workers' wages properly. *Id.* Therefore, they argued, the court should follow *Wright* and rule that the contractor failed to obtain insurance, and was subject to disgorgement. *Id.* at 851-52. The *Loranger* court declined to extend *Wright* to the point that "'any' underreporting of payroll is a failure to 'obtain' workers' compensation insurance even though the contractor has in effect a policy of workers' compensation insurance covering his/her employees." *Id.* at 857. The *Loranger* court distinguished the *Wright* opinion based upon the difference in facts. In *Loranger*, there was insufficient evidence to demonstrate that any unlicensed worker on the project was not covered by Loranger's workers' compensation insurance or that the contractor had failed to list required wages on his workers' compensation insurance. *Id.* at 853-854. In contrast, in *Wright*, there was a pattern and practice of reporting zero or next to zero for every pay period, demonstrating that the underreporting was not inadvertent. *Id.* at 855.

Paycheck argues that his alleged misreporting of wages similarly does not change the fact that he "always had valid worker's [sic] compensation coverage, or valid exemption therefrom, covering 2017 and 2018 work on the Sarna project." Sarna distinguishes *Loranger* by arguing that that case involved a mere *de minimis* payroll reporting error, and that, unlike in this case, those defendants failed to produce actual evidence of an underreported payroll.

(d) *Buzgheia v. Leasco Sierra Grove*

Sarna cites *Buzgheia* to support attacking a contractor's facially valid license to find a suspension as a matter of law. In *Buzgheia*, a commercial construction setting, the plaintiff held a facially valid contractor's license by employing a "Responsible Managing Employee" ("RME") who held the required license. *See Buzgheia,* 60 Cal.App.4th at 380. The court explained that a party to a contract may challenge whether a contractor employed a "sham" RME in order to get around

the licensing requirement. *Id.* at 386. If so, that contractor effectively acted outside its license, causing the license to be automatically suspended. *Id.* at 387.

Sarna claims that, like the plaintiff in *Buzgheia*, Paycheck held a facially valid contractor's license whose validity he may attack by going behind its face. He claims that Paycheck's license was automatically suspended because he acted outside his license by installing a fire sprinkler system that required a C-16 license, and did not timely obtain workers' compensation insurance.

iii. Application of Law to Facts

The Court finds that Paycheck hired employees during the Sarna project without obtaining workers' compensation insurance as required, and accordingly, Paycheck's license was suspended by operation of law. First, after weighing the evidence, including the credibility of witnesses, [3] the Court finds that work started in mid-November, 2017, as Sarna testified and as Paycheck testified in his deposition. Second, in both deposition testimony and interrogatory responses, Paycheck represented that he hired employees rather than independent contractors. Paycheck failed to rebut the Labor Code § 2750.5 presumption of employees because there were no facts, *e.g.* showing that a worker was licensed, to rebut the presumption. Third, it is undisputed that Paycheck did not have workers' compensation insurance during the November 12-30, 2017 time period. Since this was a failure to obtain insurance, the effective suspension date of Paycheck's license was the first day he employed another worker. Thus, Paycheck worked with a suspended license, at the very least, between the first day of the Sarna demolition and the day he acquired and filed a workers' compensation policy on December 1, 2017. In its objections, Plaintiff attempts to minimize this time period where there was no workers' compensation insurance. In other instances, this lack of

---

[3] This Court, sitting as the trier of fact, having been able to observe in person the testimony of the witnesses and after reviewing and weighing all the evidence, concludes that Paycheck's testimony is not credible. He made inaccurate and conflicting statements in his testimony and discovery responses on when work started, whether his workers were employees or contractors, and whether he had workers' compensation insurance at the start of the project. Thus, taking the evidence as a whole, this Court disbelieves Paycheck's trial testimony. While Paycheck tries to isolate his inconsistencies, the Court looks at the evidence as a whole, including having observed him testifying, to find a pattern and practice of inconsistencies and acting in contravention of his licensing requirements.

insurance may compel a different result. However, in this case, Paycheck made an affirmative misrepresentation in the agreement that he had worker's compensation insurance. Ex. 1, p. 2. Paycheck's representation was knowingly false and, therefore, the Court finds after weighing the evidence and considering all the factors, that Paycheck's seeking of insurance after he represented that he currently possessed it was not in good faith. He obtained the job and began work, including the dangerous work of demolition knowing he did not have the required workers' compensation insurance.

In addition to not acquiring workers' compensation insurance before starting the Sarna project, Paycheck significantly misrepresented his payroll when he eventually did obtain a policy, which is another incident of him not acting in good faith. The Court finds that Paycheck's underreporting went beyond the minor mistakes in *Loranger* and was more analogous to the "vast" misrepresentations in *Wright*. Paycheck, unlike *Wright*, clearly did receive a facially valid workers' compensation insurance policy starting in December 2017. However, his $30,000 annual payroll estimate in his November 2017 application and $22,685 estimate in his February 2018 application were not remotely comparable to his actual 2018 payroll of $476,444 to Castro and Orrego alone. Ex. 8. For this reason, the Court follows *Wright* and finds that Paycheck's license was suspended as a matter of law for significantly underrepresenting his payroll in workers' compensation insurance applications.

Since Paycheck did not have workers' compensation insurance during the November 12-30, 2017 phase of the Sarna project, and thereafter misrepresented his payroll when obtaining insurance, he was not duly licensed for the duration of the Sarna project. This conclusion is supported by the "obvious statutory intent . . . to discourage persons who have failed to comply with the licensing law from offering or providing their unlicensed services for pay." *Hydrotech*, 52 Cal.3d at 995. The Court finds that these were not innocent mistakes by Paycheck, but intentional acts to avoid complying with the law.

B. C-16 Fire Protection

A general contractor shall not contract for any project that includes a fire protection system unless that person holds a C-16 license, or subcontracts with someone who does. Bus. & Prof. Code

§ 7057(c); 16 CCR § 832.16. A contractor is barred from recovery if that person "labors at a task for which he or she has no expertise or license." *Buzgheia*, 60 Cal.4th at 386. If that is the case, the contractor's license is automatically suspended and the contractor is no longer duly licensed. *Id.* at 387.

The parties agree that Paycheck himself did not have a C-16 license. Paycheck argues that the fire sprinkler work was completed by Carbohol, who worked for SSS Fire, and did have a valid C-16 license. Sarna contends that Paycheck did not actually subcontract with SSS Fire for the work, and therefore that Paycheck exceeded the bounds of his license, rendering it suspended.

The Court finds that Paycheck did not act outside of his license in installing the fire protection system. There was substantial credible evidence from Sines at trial that although Carbohol acted without company authorization, SSS Fire through Sines ratified Carbohol's work and assisted Paycheck in obtaining the final sign-off from the Burlingame Fire Department. Since Paycheck contracted with Carbohol, an employee of SSS Fire with a C-16 license, the Court finds that Paycheck did not act outside of his license in that regard.

C. Section 7031(e) Substantial Compliance Provision

If a court finds that a contractor did not actually comply with licensure requirements, it may nonetheless find substantial compliance if the contractor (1) had been duly licensed as a contractor in this state prior to the performance of the act or contract, (2) acted reasonably and in good faith to maintain proper licensure, and (3) acted promptly and in good faith to remedy the failure to comply with the licensure requirements upon learning of the failure. Bus. & Prof. Code § 7031(e).

Here, as previously stated, the parties do not dispute that Paycheck held a facially valid license before and during the Sarna project. The dispute centers on whether he was "duly" licensed at that time. Sarna claims that Paycheck was not duly licensed because he "continuously hired and used employees" between the time he filed an exemption in June 2017 and the time he acquired a workers' compensation insurance policy two weeks into demolition on the Sarna project. Sarna claims that Paycheck did not act reasonably and in good faith to maintain proper licensure during the project, and that he "knowingly violated the terms of his restricted license by using employees." He further argues that the November 2017 and February 2018 policies were a series of "sham"

policies that Paycheck obtained by underreporting his payroll in order to keep premiums down.

Paycheck argues that alleged violations of his exemption prior to the Sarna project should not be considered in this matter. He also notes that his license was never explicitly suspended or revoked by the CSLB while working on the Sarna project. For the period after the initial Sarna agreement, Paycheck argues that he acted promptly and in good faith to remedy his lack of workers' compensation insurance by calling a broker quickly, and securing a valid policy on December 1, 2017.

i. Application of Law to Facts

The Court finds that Paycheck did not satisfy the elements of the substantial compliance defense. The acts of Paycheck prior to November 2017 are relevant to the issue of intent, absence of mistake, state of mind, and knowledge. Simons, *California Evidence Manual* § 6:1 *et. seq.* (2021); see *Loranger*, 184 Cal.App.4th at 855 (referring to the pattern and practice of the contractor in *Wright*). The evidence illustrates a history of noncompliance by Paycheck. He repeatedly paid employees during his exemption period prior to the Sarna project. For example, two days after receiving an exemption in June 2017, he paid Orrego $4,800. Exs. 7, 9. In total, Paycheck paid Orrego over $46,000 between the time his exemption went into effect, and the time that he obtained workers' compensation insurance. Ex. 7. Then, in the Sarna agreement, Paycheck falsely represented that his company held a $2 million workers' compensation policy. Ex. 1 The Court finds that Paycheck was not duly licensed as a contractor in the state prior to the performance of the Sarna project.

Second, Paycheck did not act in good faith to remedy his failure to comply with the licensure requirement. At the time that he made the representation to Sarna in mid-November, 2017 that he had workers' compensation insurance, Paycheck knew that he was not in compliance with the insurance requirement. This is clear because he sought and obtained a policy after starting the project. In remedying his initial failure to comply with the licensure requirements, however, Paycheck severely underreported his payroll. This is apparent from his November 29, 2017 application, his February 2018 audit, and his February 28, 2018 application. In the year following his December 2017 policy, in which he represented that he had a payroll of $30,000, Paycheck payed

over $470,000 to Orrego and Castro alone, an amount more than fifteen times greater than what he represented. Ex. 7. Paycheck exceeded the $30,000 payroll figure within two weeks of obtaining the policy. *Id.* These misrepresentations went beyond incidental or "de minimis" discrepancies, and instead represent attempts to sidestep the workers' compensation insurance requirement. Moreover, in February 2018, Paycheck's policy was canceled for failure to pay his premiums. Paycheck also argues that there is no evidence that he underreported the payroll, but documents, which were admitted into evidence, show the underreporting when compared to his payroll checks. Exs. 15, 18, 19 (insurance documents); see Ex. 5-8 (payments). By working on the Sarna project in mid-late November without workers' compensation insurance after promising otherwise, vastly misrepresenting his payroll in subsequent policy applications, and failing to pay his premiums, Paycheck did not act in good faith to remedy his lack of workers' compensation insurance. Thus, he did not demonstrate substantial compliance with the licensure requirement.

VI. CONCLUSION

The Court finds that Paycheck was not duly licensed at all times during the Sarna project, and did not meet the substantial compliance requirements of Business and Professions Code section 7031(e). Accordingly, Paycheck's complaint and all causes of action therein against Sarna are barred by Business and Professions Code section 7031(a).

In its Joint Request for C.R.C. 3.1590 Statement of Decision, the parties jointly asked whether Sarna was entitled to all compensation that Sarna paid Paycheck pursuant to Business & Professions Code section 7031(b), which provides that "Except as provided in subdivision (e), a person who utilizes the services of an unlicensed contractor may bring an action in any court of competent jurisdiction in this state to recover all compensation paid to the unlicensed contractor for performance of any act or contract." For the first time, Paycheck now claims that the statute of limitations bars this claim. Amendment to Plaintiff's Objections to Proposed Statement of Decision at 2. This claim must fail. First, Paycheck failed to request that the Court address the issue in the Statement of Decision, thus he is deemed to have waived it. *City of Coachella v. Riverside County Airport Land Use Com.* (1989) 210 Cal.App.3d 1277, 1292. Second, Paycheck waived any statute of limitations defense because he did not assert it in his answer. *Minton v. Cavaney* (1961) 56 Cal.2d

576, 581. Third, even if the defense is considered on the merits, it fails. Based upon the stipulation of the Sarnas and Paycheck, supported by Sarna's trial testimony (152:13-152:25), the amount Sarna paid Paycheck is $228,330.63, which is the amount to be repaid by Paycheck to the Sarnas.

There are still outstanding causes of action in this case. Therefore, it would be premature to enter judgment at this time. Accordingly, pursuant to California Rule of Court 3.1590(f),(m), the Court extends the time for submission of a proposed judgment until after the other claims are resolved.

IT IS SO ORDERED.

Dated: June 30, 2021

NANCY L. FINEMAN
Judge of the Superior Court of California
San Mateo County

MARK RAFTREY

225 Manzanita Ave., Palo Alto, CA 94306 | (650)-759-3541 | mraftrey@stanford.edu

WRITING SAMPLE

The attached writing sample is a final paper that I wrote for a course that I took in winter 2023, called "Climate: Politics, Finance, and Infrastructure." The paper reviews existing groundwater recharge efforts in California and explores options for incentivizing broader adoption of the practice going forward. The writing sample is entirely my own work and was not edited by anyone else.

A Market-Based Approach to Expanding Groundwater Recharge in California

Mark Raftrey

Law 2513: Climate: Politics, Finance & Infrastructure
Instructors: Alicia Seiger & Kate Gordon
Winter 2023
Submitted April 10, 2023

I. Introduction

In South-Central California, Tulare Lake covers an area three times the size of Lake Tahoe. A month ago, it did not exist. Thanks to anomalously heavy winter rains that dropped over two years worth of precipitation in this part of the state, Tulare Lake filled in a matter of weeks—even before the record snowpack in the mountains above it begins to melt in earnest (Figure 1).[1] Tulare Lake was once the largest water body in the western United States, but was drained by farmers to grow crops in the fertile Central Valley. Today, the lakebed is covered in farms, orchards, and hundreds of buildings that have suffered from damaging flooding.[2]

The refilling of Tulare Lake has not been a smooth or controlled process. With the amount of water entering the system of levees and canals in the area, it became clear that somewhere was going to be flooded. This realization led to direct conflicts between parties hoping to save their lands from that fate. For example, the 600-person farming town of Allensworth has faced threats on multiple fronts. First, someone cut a nearby earthen canal in the middle of the night, sending flood waters streaming toward town. Later, residents frantically plugged a culvert with plywood and sandbags to stem the flow of water their way. Their efforts were promptly undone by BNSF railroad, which

[1] Soumya Karlamangla & Shawn Hubler, *Tulare Lake Was Drained Off the Map. Nature Would Like a Word* (Apr. 2, 2023), https://www.nytimes.com/2023/04/02/us/tulare-lake-california-storms.html; Jason Samenow & Ian Livingston, *California's Snowpack Soars to Record High after 17 Atmospheric Rivers* (Mar. 30, 2023), https://www.washingtonpost.com/weather/2023/03/30/california-snowpack-record-sierra/.
[2] Evan Bush, *A Long-Dormant Lake Has Reappeared in California, Bringing Havoc Along With It*, CNBC (Apr. 4, 2023), https://www.cnbc.com/2023/04/04/a-long-dormant-lake-has-reappeared-in-california-bringing-havoc-along-with-it.html.

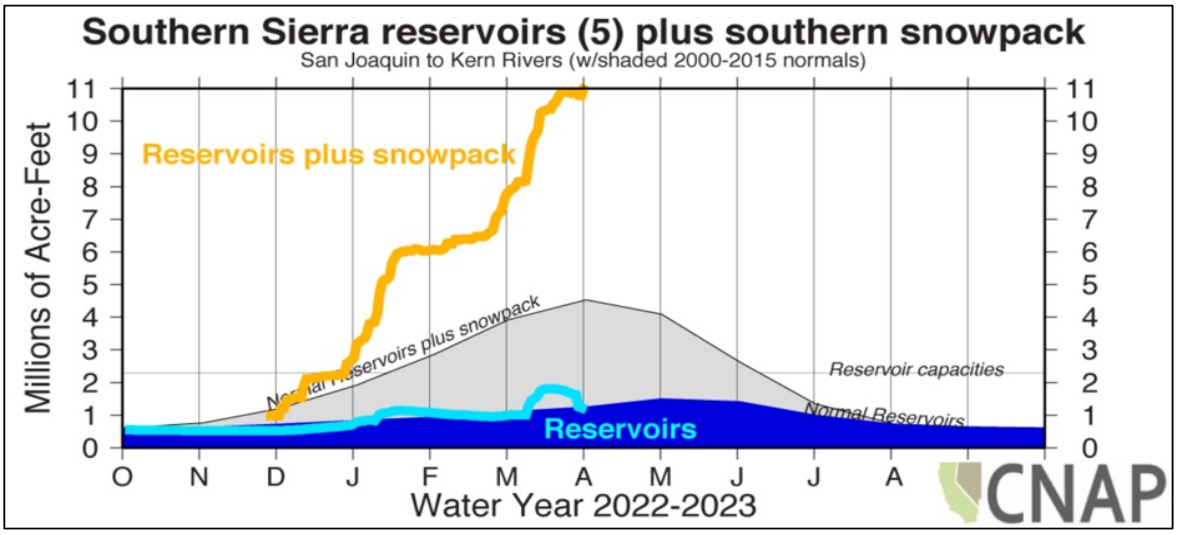


Figure 1. Southern Sierra reservoir plus snowpack water content is literally off the charts, and dwarfs the capacity of surface reservoirs alone.[3]

unblocked the conduit to prevent floodwaters from threatening the overlying highway.[4] Elsewhere, the Boswell Company, a farming giant in the region, parked heavy machinery on a canal bank to prevent anyone from cutting it to flood its land and relieve pressure elsewhere. But leaving this portion of the canal intact meant that flood waters would inevitably overtop another portion of the canal, and eventually flood Allensworth and nearby Alpaugh.[5] The town of Corcoran took things a step further by stationing armed guards on nearby levees to prevent similar mischief.[6]

The conflict in the Tulare Lake region begs the question: In a state like California, which so frequently finds itself in the opposite situation—desperately in need of

[3] California-Nevada Climate Applications Program, *Water Storage Tracking for Sierra Nevada and Upper Colorado River Basins* (Apr. 7, 2023), https://cnap.ucsd.edu/storage_in_sierra_ucrb/.
[4] *Id.*
[5] Lois Henry, *Ugly Deeds, High Drama, and Politics Swirl Amid the Waters of a Re-Emerging Tulare Lake*, FRESNO BEE (Mar. 20, 2023), https://www.fresnobee.com/news/local/article273330830.html.
[6] *Id.*

water—why was the state be so ill prepared to take advantage of abundance? Instead of a well-planned, orderly process to maximize the utility of the incoming water, the late winter and early spring has been marked by chaos.

It is clear that, like everywhere else on the planet, climate change will dramatically affect California. The California Department of Water Resources estimates that climate change will cause the state to lose 10 percent of its water supply—around 6-9 million acre-feet (AF)—over the next 20 years.[7]

The projected loss in water supply spells bad news for a state that is already dealing with groundwater overdraft, above-ground storage problems, and increased precipitation variability that make traditional water management poorly suited for our changing climate. Nonetheless, the state plans to counteract predicted losses in water supply by expanding traditional surface storage to a far greater degree than the below-ground alternative that offers significant advantages.[8]

This paper argues that the state should focus on groundwater recharge, and that its existing incentives for parties to participate in groundwater recharge projects—largely through streamlining permits and waiving application costs—are insufficient to unlock the state's massive below-ground storage capacity. It examines a potential alternative, market-based approach under which landowners get credit for demonstrated recharge that they can sell to other water users.

---

[7] CALIFORNIA DEPARTMENT OF WATER RESOURCES, CALIFORNIA'S WATER SUPPLY STRATEGY: ADAPTING TO A HOTTER, DRIER FUTURE 1 (Aug. 2022), https://resources.ca.gov/-/media/CNRA-Website/Files/Initiatives/Water-Resilience/CA-Water-Supply-Strategy.pdf.
[8] *See Id.* at 5-6.

Of course, there are concerns with this approach. Some have argued that water is a fundamental human right that should not be subject to the variability of a market-based system. And environmental issues such as whether recharge mobilizes agricultural pollution would need further study. But given the severity of California's impending water shortage, all options should be on the table.

This paper begins by outlining California's water supply and the effects that climate change has had and will continue to have thereon. It proceeds to make the case that California should focus on groundwater recharge instead of above-ground water storage by describing the benefits that groundwater recharge holds as compared to traditional above-ground options. It explains why existing incentives for pursuing groundwater recharge are insufficient, and culminates in a proposal for an alternative market-based structure that would allow landowners in advantageous areas to capture the benefits of using their land for groundwater recharge, and thereby facilitate uptake of the practice beyond current levels.

II. Water Use in California

California uses more water than any other state.[9] Around 80% of that water is used to power the state's prolific agricultural sector.[10] In 2021, California's 69,000 farms brought in over $51 billion, approximately 50% more than any other state.[11]

[9] Cheryl A. Dieter et al., U.S. Geol. Survey, *Estimated Use of Water in the United States in 2015* (2017), https://pubs.usgs.gov/circ/1441/circ1441.pdf.
[10] Cal. Dep't Water Res., *Agricultural Water Use Efficiency*, https://water.ca.gov/Programs/Water-Use-And-Efficiency/Agricultural-Water-Use-Efficiency (last accessed Apr. 3, 2023).
[11] CAL. DEPT. OF FOOD & AGRICULTURE, CALIFORNIA AGRICULTURAL STATISTICS REVIEW 2021-2022 (2022), https://www.cdfa.ca.gov/Statistics/PDFs/2022_Ag_Stats_Review.pdf.